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PREFACE TO THE SIXTH EDITION.

SINCE the appearance of the last edition there has been a large number of decisions relating to company law, some of which are of considerable importance.

It is not possible in a work of this size to deal with every new decision, and accordingly, as in previous editions, those which involve any question of principle have been selected and dealt with, others being referred to in footnotes.

The Law of Property Act, 1922, will not directly affect company law, except in a few matters, all of which have been noted in this Edition.

I am much indebted to my friend, Mr. A. R. Taylour of Lincoln's Inn, for his assistance in the preparation of this volume.

A. F. T.

5, NEW SQUARE,
LINCOLN'S INN,
1924.

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PRINCIPLES OF COMPANY LAW.

CHAPTER I.

INTRODUCTION

By far the most usual and most important form of company is a "Company Limited by Shares under the Companies Act" (*a*). This form of company will be dealt with almost exclusively in this book. Suppose a number of persons intend to combine for the purpose of carrying on some business. If there are only a few of them they will probably form a partnership; but if their numbers are at all large, and particularly if they wish to limit their individual liability for losses, they will most probably decide to form or "promote" a company limited by shares under the Companies Act. This proceeding is in outline very simple. They must first decide five things. The **object** which the company is to carry out is probably agreed already: there remain the **name** of the company, the **place** where the business is to be carried on, **how far each member undertakes to be responsible for losses** and the **amount of funds** which they consider necessary to

(*a*) The Companies (Consolidation) Act, 1908, 8 Ed. VII. c. 69, consolidated all previous legislation relating to limited companies and will be usually referred to in this book as "the Companies Act."

carry on the business properly. Their decision on these points is embodied in a short document called a Memorandum of Association, which must be signed by at least seven persons (*b*), who must each agree to take one or more shares in the company. The Memorandum so signed is taken to an official at Somerset House, called "**The Registrar of Companies,**" a fee is paid, the registrar enters the new company on the register and prepares a certificate of incorporation, and the company is complete.

The **Memorandum of Association** then contains—

1. The name of the company, which may be almost anything, provided it ends with the word "Limited";
2. The situation of the registered office of the company;
3. The objects or powers of the company;
4. How the liability of members is limited; and
5. The amount of the capital of the company.

It is a most important document, for on it the existence of the company and all its powers depend. It fixes the powers and objects of the company as between the company and the outside world—and these powers and objects cannot be altered by the company, even if every member agrees (*c*).

The persons who are to form the company must then arrange how the business is to be carried on. The whole body cannot all manage, and some provision must be made for the division of the profits or losses. All such matters are dealt with in the "**Articles of**

(*b*) Except in case of a private company, see p. 227, *post*.
(*c*) But see p. 25, *post*.

Association." This is a much longer document than the Memorandum, and generally provides for the appointment of **directors** (or managers of the business for the company), for division of the capital into **shares,** stating how these are to be allotted among the members, that **share certificates** shall be given to the members as evidence of their right to their shares, and that a **register** of members shall be kept as further evidence. The members generally reserve power to control the acts of the directors in many matters, and this leads to provision for **meetings** of members, for **votes** and the passing of **resolutions** of different kinds (*d*). Thus the whole internal management of the company is dealt with in the **Articles.** They form a binding contract between all the members and the company; but, unlike the Memorandum, the Articles may be changed at any time if a sufficient number of shareholders desire it.

The persons forming the company may not be able to find all the capital necessary for the successful working of the business. If so, they will invite the public to join in the undertaking and subscribe for shares. This is done by means of a **prospectus.**

The **capital** may be of any amount, divided into shares of any amount. It may be £10,000,000 divided into 100,000 shares of £100 each, or £10 divided into 200 shares of 1*s.* each.

Any person who acquires one or more shares becomes a **member,** or, in other words, a **shareholder** or **contributory** of the company, and becomes liable, either

(*d*) Resolutions may be (1) Ordinary; (2) Extraordinary; (3) Special. See pp. 214 to 216.

at once or when called upon, to pay to the company the money which his share represents.

When a company borrows money, it often gives to the lenders a charge or mortgage over its property, and hands to the lenders as evidence of their charge documents called **debentures.**

A company comes to an end by being **wound up**; a **liquidator** is appointed and takes possession of all the property of the company, and, after paying the debts, he distributes it among the members. Debts secured by **debentures** or other charges are, of course, paid before unsecured debts.

CHAPTER II.

THE NATURE OF A LIMITED COMPANY.

BESIDES limited companies registered under the Companies Acts there are several other forms of associations for the purpose of carrying on business.

In this chapter limited companies are contrasted with some of the more important of these forms.

I.—AS CONTRASTED WITH PARTNERSHIP.

Partnership.	Limited Companies.
(a) the "firm" is not a distinct "person"; it is made up of the several persons who compose it.	A company is a distinct being or *persona*.
Thus a firm of A. & Co., is in law A. and B. and C. and D., and the property of the firm belongs to all the members in common. Consequently partners cannot make contracts with the firm, and judgment creditors can seize the goods of any partner.	Thus the company S. and Co., Limited, is an entirely different person from Mr. S., even though he started it, and manages it and owns practically all the shares. The property is the property of S. & Co., Limited, and not of Mr. S. He can make contracts with the company, and his goods cannot be seized for the debts of the company.

Salomon v. Salomon & Co., Limited, [1897] A. C. 22.

S. had a boot business. He sold the business to a company which he formed with a capital of £40,000. The necessary seven persons were his wife, daughter, and four sons, who took one £1 share each, and S. himself, who took 20,000 shares.

The price paid by the company to S. was £30,000; but instead of paying him cash, the company gave him 20,000 fully-paid £1 shares and £10,000 in debentures (*i.e.*, he lent the £10,000 which the company owed him for purchase-money to the company on mortgage).

Owing to strikes in the boot trade the company was wound up. The assets of the company amounted to only £6000 out of which to pay the £10,000 due to S. and secured by debentures, and a further £7000 due to unsecured creditors.

The unsecured creditors claimed that as S. & Co. was really the same person as S., he could not owe money to himself and that they should be paid their £7000 first.

VAUGHAN WILLIAMS, J., **held** that the company was a mere agent for S., and he must indemnify his agent against the losses it had sustained, by paying the £7000 himself; but it was **held** by the House of Lords—once the company is incorporated, it must be treated like any other independent person, and the motives of those who promoted it are irrelevant.

The company could not be agent for S., for either—

(1) it was a legal person—then it acted for itself; or

(2) it was not—then it could not be an agent at all.

The company was not defrauded, as all the shareholders knew all about it. **The company is at law a different person altogether from the subscribers to the Memorandum.**

Result.—S. kept the £6000 in part payment of his loan to the company.

This is perhaps the most important case in company law, and every student should read for himself the judgment of Lord MACNAGHTEN on p. 47 of the report.

Partnership.	Limited Companies.
(b) One partner cannot transfer his share without the consent of the others.	Shares are freely transferable.

Partnership—*cont.*	Limited Companies—*cont.*
(c) Each partner is an agent of the firm to make contracts (Partnership Act, 1890, s. 5).	A shareholder is not an agent for the company.
(d) The liability of each partner for the debts of the firm is unlimited, except in case of a limited partnership under the Limited Partnership Act, 1907 (*a*).	The liability of each shareholder may be limited either by shares or by guarantee.
(e) Partners may make what private arrangements they like among themselves.	There are some arrangements between members of a company which are not allowed, *e.g.*, the company cannot buy the shares of the members.

II.—UNINCORPORATED COMPANIES.

These were like very large partnerships; but the shares were made transferable and the management was conducted by a body of directors. They were treated in law as big partnerships, and the liability of members was unlimited.

Such companies can no longer be created, for by the Companies Act, s. 1, no company or partnership of more than ten persons can be formed for the purpose of banking, or of more than twenty persons for other business, unless it is registered under the Act or incorporated by statute or letters patent.

(*a*) 7 Ed. VII. c. 24. Under this Act a partnership may consist of one or more "general partners" who are all liable for all the debts of the firm, and of one or more limited partners who bring in a specified amount of capital, and are not liable for more than the amount brought in. Such partnerships must be registered, and the limited partners cannot manage the business, or bind the firm.

III.—INCORPORATED COMPANIES.

(A.) Under the Act of 1844.

Owing to the inconvenience of the last-mentioned form of company, this Act allowed companies to be incorporated. The result was that they could sue and hold property in their own names; but the members remained individually liable, and all attempts to limit their liability failed.

(B.) By Royal Charter.

(*e.g.*, Bank of England.)

(a) At common law the members were not liable for the debts of the Corporation (there are now some exceptions).

(b) A corporation has all the powers of an ordinary person and they cannot be modified even by the creating charter. But the Crown may annul the charter if the limit placed on the powers by the charter is disregarded (*Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D. 685).

Limited Companies.

Members are liable up to the amount of their shares.

The powers of a company depend on its Memorandum of Association (*Ashbury Railway Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 671). If directors do an act which is not within the Memorandum, the shareholders cannot ratify it.

(C.) By Special Act of Parliament (Statutory Companies).

Railway and other companies which want compulsory powers to take land and commit nuisances

must be incorporated by a special Act of Parliament, *e.g.*, the Southern Railway Company. The provisions of the special Acts required in each case were found to be very similar; consequently several public statutes were enacted containing general provisions, and one or more of these Acts are adopted in each private Act, *e.g.*:

The Companies Clauses Consolidation Act, 1845, defines the liability of shareholders and regulates borrowing powers, granting of certificates, and the constitution of such companies generally.

The Railway Clauses Act, 1845, contains rules for making railways, and deals with deviations, bridges, level crossings, etc.

The Land Clauses Consolidation Act, 1845, as to compulsory purchase of land, notices to be given, how the land is to be conveyed, and the purchase-money paid, etc.

Statutory Companies.	Limited Companies.
(a) The powers are limited by the special Act which creates the company and to which it owes its whole existence.	The powers depend on the Memorandum.
(b) The liability of members is limited as follows: By s. 36 of the Companies Clauses Act, if execution is levied against the company, and there is	Limited by shares.

Statutory Companies.—*cont.*	Limited Companies—*cont.*
not enough to pay the debt, the creditor may issue execution against the shareholders to the extent of their shares (*b*).	
(c) The company can only borrow money when the whole of its capital has been subscribed and at least half actually paid up, and even then can usually only borrow to the extent of one-third of its capital.	The borrowing powers of the company are usually unlimited, but may be limited by the Memorandum.
(d) The company cannot lease its undertaking without the consent of Parliament.	If the Memorandum allows it, the company can lease the whole of its undertaking.

IV.—BUILDING SOCIETIES, INDUSTRIAL, PROVIDENT, AND FRIENDLY SOCIETIES.

Are governed by their own special Acts. They are not companies, but the liability of members is limited.

V.—OTHER COMPANIES UNDER THE COMPANIES ACT.

1. Unlimited companies:

The liability of the members is not limited at all.

(*b*) This used to be done by *scire facias*, but now by application to a judge under O. XLII., r. 23.

These companies are rare, their position is much the same as companies incorporated under the Act of 1844.

2. Companies limited by guarantee:

Each member undertakes to be liable to pay the debts of the company up to a certain amount, but the capital of the company is not usually divided into shares.

Further details of this form of company will be found on p. 232.

Usual Steps in the Formation of a Company.

First, prepare the Memorandum of Association (Chapter III.).

Secondly, prepare the Articles of Association (if any), Chapter IV.

Thirdly, prepare the Preliminary Contracts (if any), Chapter V., s. 1.

Fourthly, the Company must be registered (Chapter V., s. 2).

Fifthly, the necessary working capital must be obtained (Chapter VI.).

Specimen Form of Memorandum of Association.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

Company Limited by Shares.

Memorandum of Association of Blank Company, Limited.

1. The name of the company is "Blank Company, Limited."

2. The registered office of the company will be situate in England.

3. The objects for which the company is established are:

(a) To acquire and take over as a going concern the undertaking, and all or any of the assets and liabilities of Jones Brothers, and with a view thereto to adopt the agreement referred to in clause 3 of the company's Articles of Association, and to carry the same into effect with or without modification.

(b) To carry on business as brewers, maltsters, corn merchants, distillers, hop merchants, wine and spirit merchants and importers, manufacturers of aerated and mineral waters and other drinks, licensed victuallers, hotel keepers, beerhouse keepers, restaurant keepers, lodging-house keepers, farmers, dairymen, ice merchants, tobacconists, brick makers, bath keepers, and to buy, sell, manipulate, and deal (both wholesale and retail) in commodities of all kinds which can conveniently

be dealt in by the company in connection with any of its objects and to carry on any other businesses, whether manufacturing or otherwise, capable of being conveniently carried on in connection with any of the company's objects, or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights.

* * * * *

(f) To enter into partnership or into any arrangement for sharing profits, union of interest, reciprocal concession, or co-operation with any person or company carrying on or about to carry on any business which this company is authorised to carry on, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take or otherwise acquire and hold shares or stock in, or securities of, and to subsidise or otherwise assist any such company, and to sell, hold, re-issue with or without guarantee, or otherwise deal with such shares or securities.

* * * * *

(h) To aid in the establishment and support of associations or institutions calculated to benefit persons employed by the company, or having dealings with the company, to provide for the welfare of persons in the employment of the company, or formerly in the employment of the company, and the widows and children of such persons and others dependent on them,

by granting money or pensions, providing schools, reading rooms, places of recreation, or subscribing to sick or benefit clubs, or societies, to subscribe or guarantee money for charitable or benevolent objects, or for any exhibition, and generally for any purpose which may seem likely, whether directly or indirectly, to promote the development of the business of the company, or to prevent its contraction, or for any public, general, or useful object.

(i) To sell the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and in particular wholly or partly for shares, debentures, debenture stock, or securities of any other company, and to accept and take any such shares, stock, debentures, or securities in satisfaction of any money payable to, or any claim of, the company.

* * * * *

(u) To do all such things as are incidental or conducive to the attainment of any of the above-mentioned objects.

4. The liability of the members is limited.

5. The capital of the company is £25,000, divided into 25,000 shares of £1 each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber
John Jones, of	One.
William Smith, of	One.
Thomas Brown, of	One.
Benjamin Green, of	One.
Andrew Black, of	One.
Arthur Drew, of	One.
John Smith, of	One.

Dated this 4th day of February, 1924.

Witness to all the above written signatures,

GEORGE BROWNE.

CHAPTER III.

MEMORANDUM OF ASSOCIATION.

Before reading this chapter read the form of Memorandum on p. 13, which is a Memorandum of a company actually in existence, but owing to the great length of clause 3, several of the paragraphs have been omitted.

This chapter should be read as explaining the form, clause by clause.

Section 1.

Clause I.—The Name.

Any name may be chosen subject to the following restrictions:

1. The last word of the name must be "limited." (*a*)
2. The words "royal" or "imperial" and other similar words must not be used without authority.
3. The name must not resemble that of any other existing company or firm.

As to 1.—When an old business is turned into a limited company, the old name is often retained with the addition of "limited." The name should be as short as possible, *e.g.*, "Jons, Limited," and "The Palmer Tyre, Limited."

The name (with the word **"limited"**) must be painted up (*aa*) or affixed to the outside of every office or place

(*a*) Sect. 3 (1).

(*aa*) Companies Act, s. 63. Penalty, £5 a day; and the same, if a person, not being a limited company, uses the word "Limited." Companies Act, s. 282.

in which business of the company is carried on, in a conspicuous position, easily legible, and on all cheques (*b*), notices, advertisements, bills, etc., of the company.

This is to ensure that all persons dealing with the company shall have clear notice that the liability of the members is limited.

In the case of a company registered after the 22nd of November, 1916, the names of the directors must also appear on Catalogues, Circulars, etc., unless the company is specially exempted by the Board of Trade. (*bb*)

If the company makes a contract without the use of the word "limited," (*c*) the effect may be most serious for the officers of the company; suppose, for instance, Mr. Salomon, contracting on behalf of his company, had omitted the word "limited," the contract would have been made by him personally (*d*);

Atkins & Co., Ltd. v. Wardle (1889), 58 L. J. Q. B. 377.

A, B, and C, the directors of the South Shields Salt Water Baths Co., Limited, accepted bills thus:—"Accepted A, B, C, directors of the S. Shields Salt Water Baths Company." **Held**, the directors were personally liable.

There is one exception to the rule that the word "limited" must be used. **Companies formed to promote art, science, etc.**, which do not propose to pay dividends, but to apply all gains towards the working of the company, may register a name **without the word "limited"** (*e*). They thus become corporations, and can own property and sue in their own names, and the

(*b*) Companies Act, s. 63 (3). Penalty, £50, and personal liability if the company does not pay.

(*bb*) Companies (Particulars as to Directors) Act, 1917.

(*c*) An abbreviation such as "Ltd." may be used. *F. Stacey Co. Ltd.* v. *Wallis* (1912), 28 Times Rep. 209.

(*d*) See also *Penrose* v. *Martyr* (1858), E. B. & E. 499; *Chapman* v. *Smethurst*, [1909] W. N. 65.

(*e*) Companies Act, ss. 19 and 20. A licence must be obtained from the Board of Trade, and it may be revoked.

liability of the members is limited, *e.g.*, Newnham College, Cambridge, and the Cyclists' Touring Club.

As to 3.—A new company may not select a name so like that of an existing company or firm as to lead to confusion (*f*). The registrar may refuse to register such a name, or may be prevented by injunction from registering it, and even if he does register it, the other company may get an injunction and have it removed.

But the Court will not interfere with the discretion of the Registrar unless he has exercised his discretion upon some wrong principle of law or has been influenced by matters which he ought not to have considered (*g*).

This jurisdiction is not confined to cases where the old name is actually registered.

Société Panhard et Levassor v. Panhard Levassor Motor Co., Ltd., [1901] 2 Ch. 513.

The well-known French company had no agency in England, but their cars were used in England. An English company was formed with a capital of £100, and with only seven members, with a view to preventing the French company from being registered in England in their own name, and thus competing more successfully with English firms:—**Held**, the name of the English company must be struck off the register. The seven members were ordered, either—

(1) to change the name with the consent of the Board of Trade, or

(2) to wind up the company.

Change of Name.

A company may change its name, either—

(1) by special resolution with the consent of the

(*f*) *Re Cash & Co.*, [1907] 2 Ch. 189; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, [1907] 2 Ch. 313. *Kingston Miller & Co.* v. *Thomas Kingston & Co.*, [1912] 1 Ch. 575. *Ewing* v. *Buttercup Margarine Co.*, [1917] 2 Ch. 1.

(*g*) *Rex* v. *Registrar of Companies*, [1912] 3 K. B. 23.

Board of Trade, which will always be given if there is a good reason for the change, or

(2) if it has by inadvertence registered a name similar to that of an existing company, then by consent of the registrar (*h*).

In order to prevent difficulties arising from a change of name it is enacted that all proceedings brought by or against the company in its old name remain good notwithstanding any change of name (*i*).

SECTION 2.

Clause II.—The Registered Office.

The Memorandum must state whether the office is to be in England (which includes Wales), Scotland or Ireland: such information is all that is required, for it is enough to show where the company will be registered; thus, if "in England," it will be registered at Somerset House.

This fixes the **domicil** and nationality (*j*) of the company, and it cannot be changed without the consent of Parliament. But the situation of the office may be changed from one part of England to another by giving notice to the Registrar.

Every company must have a registered office (*k*). The register of members (*l*) is kept there; writs and notices must be served there; but if there is no registered office, an order for substituted service will

(*h*) Companies Act, s. 8.
(*i*) Companies Act, s. 8 (5).
(*j*) *Continental Tyre Co.* v. *Daimler Co., Ltd.*, [1915] 1 K. B. 893.
(*k*) Companies Act, s. 62. Penalty, £5 a day.
(*l*) It should be clearly understood that the register at Somerset House kept by the Registrar is quite distinct from the company's own register of members kept by its own secretary.

be made, or the writ may be served on the secretary and directors at an office which is not registered.

Re Fortune Copper Mining Co. (1870), 10 Eq. 390.

The registered office of the company had been pulled down. The writ was served on the secretary and directors at an unregistered office.—**Held,** good service.

SECTION 3.

Clause III.—The Objects of the Company.

The company cannot do anything outside the powers given in the Memorandum—anything so done becomes *ultra vires,* and **the Memorandum cannot be changed without leave of the court.**

If an act is done by the directors which is *ultra vires* (beyond the powers of) the company, it is **void,** and the company cannot make it valid, even if every member assents to it.

Ashbury Railway Carriage Co. v. Riche (1875), L. R. 7 H. L. p. 672.

The **Memorandum** gave the company power to make and sell **railway carriages.** The directors bought a **railway concession** in Belgium. The **Articles** gave express power to the company to extend its business beyond the Memorandum by special resolution. The company passed a special resolution to ratify the purchase.—**Held,** the purchase was bad. "If every shareholder had been in the room, and if every shareholder had said, 'that is a contract which we authorise the directors to make,' it would be void. The shareholders would thereby by unanimous consent, have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing" (*per* Lord CAIRNS, L.C.).

This rule is meant to protect future shareholders and the public at large who deal with the company.

But if the act had been *ultra vires* (beyond the powers of) **the directors** only, the shareholders could have ratified it.

Or if it had been *ultra vires* **the Articles**, the company could have altered its Articles in the proper way.

See the last-mentioned case, at p. 674 of the report.

And, if an act is within the powers of the company, any irregularities are cured by the consent of all the shareholders. *Re Express Engineering Works, Ltd.* [1920], 1 Ch. 466.

If property is acquired by *ultra vires* expenditure, the company's rights over it may be protected.

National Telephone Co. v. Constables of St. Peter Port, [1900] A. C. 317, 321.

The company put up telephone wires in Guernsey. The defendants cut them down. There was no power in the Memorandum to put up wires there.—**Held,** that fact alone would not prevent the company from suing for damage done to the wires (*m*).

The powers in the Memorandum must not, however, be construed strictly, and the company may do anything which is **fairly incidental** to the powers specified.

Foster v. London, Chatham and Dover Rail. Co., [1895] 1 Q. B. 711.

The company acquired a piece of land for the purposes of its railway. The railway was erected on arches. The company let the arches as workshops, etc. The neighbours objected (on account of noise and rubbish), and claimed that it was *ultra vires*:—**Held,** valid, as being fairly incidental to the powers of the company (*n*).

On the other hand, the following was held **not to be incidental.**

(*m*) See also *Ayers* v. *South Australian Banking Co.*, L. R. 3 P. C. pp. 558 and 559.

(*n*) A railway company was held to have power to grant an option for a lease of a refreshment room at a station in *County Hotel Co.* v. *London & North Western Railway*, [1918] 2 K. B. 251. See also *Evans* v. *Brunner, Mond & Co.* [1921], 1 Ch. 359.

Attorney-General v. London County Council, [1902] A. C. 165.

The council had power to run tramways. It ran omnibuses to feed the tramways.—**Held,** this was outside its powers.

N.B.—These were statutory corporations, but the same principle applies to the special statute as to a Memorandum of Association.

Powers not expressly mentioned in the Memorandum may be implied if they are warranted by the constitution of the company. Thus a trading company has implied power to borrow (see p. 145) and to sell land (*Re Kingsbury Collieries, Ltd.*, [1907] 2 Ch. 259), and to give pensions or other rewards to its servants or employees (*o*).

A company **may hold land** in spite of the Mortmain Acts (*p*), unless it is formed for the purpose of promoting art, science, religion, charity, or other like object not involving the acquisition of gain. In such a case it cannot hold more than two acres of land without the licence of the Board of Trade (*q*).

The powers of a company are generally expressed in very wide terms, because it is very inconvenient for a company, or those dealing with it, to be in doubt as to the powers which the company has.

If these powers are set out in very general terms, they are apt to be misleading, as the Courts have sometimes construed these wide powers in a very narrow manner. A company usually has a **main object,** which is put first in the list of its objects—or there may be two or more main objects, as in clauses (a) and (b) in the form on p. 13.

Detailed powers which are usually set out under clause 3 of the Memorandum are sometimes construed

(*o*) *Cyclists' Touring Club* v. *Hopkinson*, [1910] 1 Ch. 179.
(*p*) Companies Act, s. 16 (2). (*q*) Companies Act, s. 19.

as merely incidental to the **main** objects of the company, which are ascertained from the first few paragraphs of clause 3, read in conjunction with the name of the company (*Re Crown Bank*, [1890] 44 Ch. D. 634).

Stephens v. Mysore Reefs, Limited, [1902] 1 Ch. 745; **Pedlar v. Road Block Gold Mines, Limited,** [1905] 2 Ch. 427.

In both these cases the Memorandum (clause 2) authorised the company to acquire gold mines "in Mysore and elsewhere," and the Memorandum in each case contained wide general clauses:— **Held,—In the first case,** that the company **could not** purchase an option with a view to forming a new company to work mines on the Gold Coast; **in the second case,** that the company **could** purchase and work a gold mine in Bombay; because the first did not come within clause 2 and the second did.

In order to avoid this narrow construction adopted by the Courts the Memorandum of Association is usually now framed so as to state all the possible things that the company may wish to do as independent main objects of the company, and, if this is clearly the intention of the document, the Courts will construe it in this manner.

Cotman v. Brougham, [1918] A. C. 514.

An oil company underwrote shares in a rubber company. The Memorandum contained as one of the objects subscribing for shares of other companies, and it was expressly stated that each of the objects were to be considered as separate and independent main objects of the company.—**Held,** the underwriting was not *ultra vires.*

If the **main object** is gone, the company must be wound up.

Re Amalgamated Syndicate, [1897] 2 Ch. 600.

The company was formed to erect stands and let out seats for the Diamond Jubilee. The Memorandum also contained power

(d) to carry on all kinds of promotion business, and (e) to act as house agents. There was a heavy loss. After the Jubilee the directors proposed to carry on business under clauses (d) and (e):— **Held,** the company must be wound up, its **substratum** or **main object** having gone. VAUGHAN WILLIAMS, J.: "I ought not to read these clauses as defining a succession of objects different from the main object, but . . . as general powers merely providing for the execution by the company of matters which are only incidental to its main objects."

This rule has not been altered by the case of *Cotman* v. *Brougham* (above) (*r*).

The objects of a company **must not be illegal**, *e.g.* to carry on a lottery, or to do something forbidden by the Companies Act, such as buying its own shares (see p. 83), or blasphemous (*Bowman* v. *Secular Society*, [1917] A. C. 406).

A power given in the Memorandum to sell the whole of its undertaking for shares (as in clause (i) in the form on p. 15) does not enable the company to force its shareholders to take shares in a new company (*s*).

A power is often taken (as in clause (a) in the form on p. 13) to adopt an agreement already entered into by an agent for the company before its formation. The law relating to such contracts is peculiar and will be discussed in Chapter V.

The powers of a company may be extended.

A company may alter or extend its memorandum (*t*)

(*r*) The case of *Stephens* v. *Mysore Reefs* (above) probably went too far in extending this principle to the construction of a Memorandum on a question of *ultra vires*. The considerations above really only apply on a question of winding up.

(*s*) *Bisgood* v. *Henderson's Transvaal, Limited*, [1908] 1 Ch. at p. 757, overruling *Cotton* v. *Imperial, etc., Corporation*, [1892] 3 Ch. 454.

(*t*) Companies Act, s. 9. This extends to a friendly Society which has been converted into a Limited Company. Companies (Converted Societies) Act, 1910, 10 Ed. VII. and 1 Geo. V., c. 23.

by special resolution confirmed by the court (*u*) if the alteration is required to enable the company—

(a) to carry on its business more economically or more efficiently; or

(b) to attain its main purpose by new or improved means; or

(c) to enlarge or change the local area of its operations; or

(d) to carry on some other business which may be conveniently combined with its own; or

(e) to restrict or abandon any of its objects (*x*).

But the Court will not allow entirely new powers to be acquired except on special terms.

Re Cyclists' Touring Club, [1907] 1 Ch. 269.

The company was registered without the word "limited" (see p. 18). The Memorandum stated that the objects were "to promote, assist, and protect the use of bicycles, tricycles, and other similar vehicles on the public roads." The company proposed to alter its powers by admitting all tourists, including motorists:—**Held,** the alteration must not be allowed, as it did not fall within clause (a) to (e) of the section: especially as one of the objects of the company was to protect cyclists against motorists.

The Court may, before approving an extension of objects, require an alteration in the name of the company (*y*), unless such an alteration would be very inconvenient (*z*).

The procedure is by petition to the court (*a*).

A company governed by a deed of settlement may adopt a Memorandum and articles in its place by the same procedure (sect. 264).

(*u*) This includes any judge in the Chancery Division. *Re Essex etc., Society Limited,* [1909] W. N. 102.

(*x*) *Jewish Colonial Trust Limited,* [1908] 2 Ch. 287, and see *New Westminster Brewery Co. Ltd.,* [1911] W. N. 247.

(*y*) *Indian Mechanical Gold Co.,* [1891] 3 Ch. 538.

(*z*) *Trust Co. of Australasia,* [1908] W. N. 229.

(*a*) A form of petition will be found under the heading "Reduction of Capital."

SECTION 4.

Clause IV.—The Limitation of Liability.

A statement that the liability of members is limited (as in the form on p. 15) without more, means "limited by shares"—that is, that no member can be called upon to pay more than the nominal amount of his share, or so much thereof as remains unpaid; and, if his shares be fully paid up, his liability is nil.

Exception. If a company carries on business for more than six months after the number of its members has been reduced below seven (or two in case of a private company) every member who knows this fact is liable to pay all the debts contracted during that time (*b*).

A company may be limited by guarantee. Then clause 4 will run, "Every member of the company undertakes to contribute to the assets of the company . . . for payment of the debts . . . etc. . . . such amount as may be required, not exceeding £ ."

This form of company is not nearly so common as the former, and is dealt with on p. 232.

In the case of a banking company which issues notes, the liability of its members on the notes is unlimited (*c*).

SECTION 5.

Clause V.—The Capital Clause.

This clause must state the amount of the nominal capital of the company and the number and amount of the shares (*d*). See clause 5 of the form on p. 15.

(*b*) Companies Act, s. 115. (*c*) Companies Act, s. 251.
(*d*) Companies Act, s. 3.

There is no legal limit to the amount of capital or of each share: some companies have a capital of only £7, while the capital of others may be £20,000,000 or more. The shares may be 1*s.* each or £5000, or any other amount.

The amount of capital is determined by the cost of starting the business, and the amount required for working it when started.

Thus, suppose the business and goodwill are to be purchased by the company for £200,000 in cash and £100,000 in shares, and £100,000 is needed for working capital.

Allowing £50,000 for emergencies, the amount of **cash** required to be raised would be £350,000. £150,000 of this may be borrowed by the issue of **debentures**, say 1500 debentures of £100 each. This will leave £200,000 to be subscribed in cash, besides the £100,000 worth of shares for the vendors of the business.

The capital of the company will then be £300,000 divided into (say) 1000 five per cent. preference shares of £100 each, and 200,000 ordinary shares of £1 each. (*Note.*—Money borrowed on debentures is not "**capital.**")

The fact that there are different classes of shares need not be stated in the Memorandum, but may be provided for in the Articles.

Sometimes the rights of the preference shareholders are specified in the Memorandum so as to give them further security, for it is then impossible for the company to change their rights (*e*).

(*e*) See *post*, pp. 130 and 131.

The Memorandum sometimes gives express power to the company to alter these rights, provided the alteration is sanctioned by resolutions passed at separate meetings of the holders of the classes of shares affected by the alteration.

Provisions are sometimes inserted in the Memorandum, authorising the company to increase its capital and issue preference shares, &c.; but such provisions are not necessary.

SECTION 6.

Association Clause and Subscription.

See the clause at the end of the form on p. 16.

There must be **at least** seven persons (*f*), and they must subscribe for **at least** one share each.

The full name and description of each must be set out.

Any one may subscribe, even an infant (*Re Laxon & Co.*, [1892] 3 Ch. 555).

His contract to take shares is voidable but not void.

All the members may be foreigners, provided the business or its management is to be carried on in England. An English registered company can own a British ship though all its members are foreigners (*R.* v *Arnand* (1846), 9 Q. B. 806).

The signatures must be attested by a witness; but one witness to all the signatures is sufficient.

The duties of the subscribers are—

(1) to pay for the shares for which they have subscribed;

(2) to sign the Articles of Association;

(3) to appoint the first directors; and

(*f*) Except in the case of a private company, see Chapter XVII.

(4) usually to act as directors until such appointment (*g*).

Form of Articles of Association.

The following are some of the clauses contained in the articles of a company now in existence, and will serve to show some of the matters usually dealt with.

(*Many of the clauses are omitted for the sake of brevity.*)

THE COMPANIES (CONSOLIDATION) ACT, 1908.

Company limited by Shares

Articles of Association of Blank Company, Limited.

1. *Definitions.*—"The Companies Act" means the Companies (Consolidation) Act, 1908. "The Office" means the registered office of the Company. "Month" means calendar month. Words importing the singular number include the plural number.

2. *Table "A" not to apply.*—The regulations contained in Table "A" in the First Schedule to the Companies Act, shall not apply to the company.

3. *Preliminary contract.*—The company shall forthwith adopt the agreement dated the 31st December, 1909, and made between William Jones of the one part and Alfred Smith on behalf of this company of the other part, which has, for the purpose of identification, been initialed by three of the subscribers to the Memorandum of Association, and the directors shall carry the said agreement into effect with or without modification.

(*g*) This depends on the Articles.

SHARES.

4. *Capital.*—The capital of the company shall be divided into 5000 preference shares of £1 each, and 20,000 ordinary shares of £1 each. The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of five per cent. per annum, and the right in a winding up of the company to repayment of capital in priority to all other shares, but no other rights in the capital or profits of the company.

6. *Underwriting commission.*—The directors may exercise the powers conferred on the company by s. 89 of the Companies Act, but so that the commission in such section mentioned shall not exceed twenty-five per cent., payable either in cash or shares, on the shares in each case offered for subscription.

CERTIFICATES.

11. *Certificates.*—The certificates of title to shares shall be issued under the seal of the company, and signed in such manner as the directors shall prescribe.

12. *Members entitled to one gratis.*—Every member shall be entitled without payment to one certificate for all the shares registered in his name. Every certificate of shares shall specify the numbers of the shares in respect of which it is issued, and the amount paid up thereon.

CALLS.

15. *Calls.*—The directors may, from time to time, make such calls as they think fit upon the members in respect of all money unpaid on the shares held by them and not by the conditions of allotment thereof made payable at fixed times, and each member shall

pay the amount of every call so made on him to the persons and at the time and at the place appointed by the directors. A call may be made payable either in one sum or by two or more instalments. A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed. Seven days' notice at least of any call shall be given specifying the time and place of payment and to whom such call shall be paid.

FORFEITURE AND LIEN.

19. *If call or instalment not paid, notice may be served.*—If any member fail to pay any call or instalment on or before the day appointed for the payment of the same, the directors may at any time thereafter during such time as the call or instalment remains unpaid, serve a notice on such member requiring him to pay the same, together with any interest that may have accrued, and all expenses that may have been incurred by the company by reason of such non-payment.

20. (Form of notice.)

21. *If notice not complied with, shares may be forfeited.*—If the requirements of any such notice as aforesaid are not complied with, any shares in respect of which such notice has been given may at any time thereafter, before payment of all calls or instalments, interest and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited shares, and not actually paid before the forfeiture.

23. *Forfeited shares become the property of the company.*—Any shares so forfeited shall be deemed to be the property of the company and the directors may sell, re-allot or otherwise dispose of the same in such manner as they think fit, and either subject to or freed from the calls made prior to forfeiture.

24. *Arrears payable, notwithstanding forfeiture.*—Any member whose shares have been forfeited shall, notwithstanding, be liable to pay and shall forthwith pay to the company all calls, instalments, interest, and expenses owing upon or in respect of such shares at the time of forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of ten per cent. per annum, and the directors shall enforce the payment of such moneys or any part thereof if they think fit, but shall be under no obligation so to do.

25. *Power to annul forfeiture.*—The directors may, at any time before the share so forfeited shall have been sold, re-allotted, or otherwise disposed of, annul the forfeiture thereof upon such conditions as they think fit.

26. *Company's lien.*—The company shall have a first and paramount lien upon all the shares (other than fully paid-up shares) registered in the name of each member (whether solely or jointly with others) for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment or discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends declared on such shares.

27. *As to enforcing lien by sale.*—For the purpose of enforcing such lien the directors may sell the shares subject thereto in such manner as they think fit; but no sale shall be made until such period as aforesaid shall have arrived, and until notice in writing of the intention to sell shall have been served on such member, his executors or administrators, and default shall have been made by him or them in the payment, fulfilment, or discharge of such debts, liabilities, or engagements, for seven days after such notice.

TRANSFER AND TRANSMISSION OF SHARES.

30. *Execution of transfer.*—The instrument of transfer shall be in writing, signed both by the transferor and the transferee, and the transferor shall be deemed to remain a holder of the shares until the name of the transferee is entered in the register in respect thereof.

31. *Form of transfer.*—The instrument of transfer of any shares shall be in the usual or common form, or in such other form as the directors shall approve.

32. *Restraint on transfer.*—The directors may decline to register any transfer of shares upon which the company has a lien, and in the case of shares not fully paid up, may refuse to register a transfer without assigning any reason therefor.

37. *Trusts not recognised.*—The company shall be entitled to treat the registered holder of any share as the absolute owner thereof and accordingly shall not be bound or affected by notice of any trust, charge, or other interest, legal or equitable, partial or absolute,

by virtue whereof any person other than the registered holder or the survivor of joint holders shall be, or shall claim to be, interested in any share.

39. *Persons entitled by transmission to be registered.*—Where any person entitled under the transmission clause to any partly paid shares shall fail for two months after being thereto required by the directors in writing to procure himself or some other person to be registered as holder of the shares, the directors may, at any time thereafter, before compliance with the request, by resolution, forfeit such shares.

SHARE WARRANTS.

40. *Power to issue share warrants—Conditions.*—The company, with respect to fully paid-up shares, may issue warrants (hereinafter called "share warrants") stating that the bearer is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of future dividends on the shares included in such warrants. The directors may determine, and from time to time vary, the conditions upon which share warrants shall be issued, and in particular, upon which a new share warrant or coupon shall be issued in the place of one worn out, defaced, lost, or destroyed, upon which the bearer of a share warrant shall be entitled to attend and vote at general meetings, and upon which a share warrant may be surrendered and the name of the holder entered in the register in respect of the shares therein specified. Subject to such conditions, and to these presents, the bearer of a share warrant shall be a member to the full extent. The holder of a share warrant shall be subject to the conditions for the time

being in force, whether made before or after the issue of such warrant.

CONVERSION OF SHARES INTO STOCK.

41. *Paid-up shares convertible into stock.*—The company (in general meeting) may convert any paid-up shares into stock, and re-convert any stock into fully-paid shares of any denomination. When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interests, in the manner and subject to the regulations hereinbefore provided. Provided always that the directors may from time to time, if they think fit, fix the minimum amount of stock transferable, and direct that fractions of a pound shall not be dealt with, but with power, at their discretion, to waive such rules in any particular case.

INCREASE AND REDUCTION OF CAPITAL.

43.—*Increase of capital.*—The company in general meeting may, from time to time, increase the capital by the creation of new shares of such amount as may be deemed expedient.

48. *Reduction of capital.*—The company may from time to time reduce its capital or cancel shares in any manner permitted by law, and may consolidate or subdivide any of its shares, and paid-up capital may be paid off upon the footing that the amount may be called up again or otherwise.

BORROWING POWERS.

49. *Borrowing Powers.*—The directors may from time to time, as in their judgment they may deem expedient, borrow, for the purposes of the company, any sum or sums of money, and they may secure the moneys so borrowed by the issue of debentures or debenture stock, mortgages, bonds or other instruments of charge upon the whole or any part or parts of the company's property or assets (both present and future) including its uncalled capital for the time being, or otherwise as they may think fit. The directors shall duly comply with the requirements of section 93 of the Companies Act or any statutory modification thereof in regard to the registration of mortgages and charges therein specified and otherwise

GENERAL MEETINGS.

50. *Statutory meeting.*—The statutory meeting of the company shall (as required by section 65 of the Companies Act) be held within a period of not less than one month or more than three months from the date at which the company shall be entitled to commence business, and the directors shall comply with the other requirements of that section, as to the report to be submitted and otherwise.

51. *General meetings.*—Other general meetings shall be held once in the year 1910 and once in every subsequent year, at such time (not being more than fifteen months from the date of the last preceding meeting) and at such place as may be prescribed by the company in general meeting; and, if no other time or place is

prescribed, a general meeting shall be held at such time (subject as aforesaid) and at such place as may be determined by the directors.

53. *When extraordinary meeting to be called.*—The directors may, whenever they think fit, and they shall upon a requisition made in writing by members holding not less than one-tenth of the issued capital of the company, upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

58. *Notices of meetings.*—Seven clear days' notice at the least, specifying the place, day, and hour of meeting, and, in case of special business, the general nature of such business, shall, except as next hereinafter mentioned, be given by notice sent by post or otherwise served as hereinafter provided.

59. *Accidental omission of notice not to invalidate resolution.*—The accidental omission to give any such notice to any of the members or the non-receipt by any member of such notice, shall not invalidate any resolution passed at such meeting.

PROCEEDINGS AT GENERAL MEETINGS.

60. *Business of ordinary general meetings.*—The business of an annual general meeting shall be to receive and consider the statement of income and expenditure, the balance-sheet, the ordinary reports of the directors and auditors, to elect directors and other officers in the place of those retiring by rotation or otherwise, to declare dividends and to transact any other business which under these presents ought to be

transacted at an annual general meeting. All other business transacted at an annual general meeting, and all business transacted at an extraordinary general meeting shall be deemed special.

64. *How questions decided.*—Every question submitted to a meeting shall, unless unanimously decided, be decided, in the first instance, by a show of hands, and in the case of an equality of votes the chairman shall, both on show of hands and at a poll, have a casting vote in addition to the vote or votes to which he may be entitled as a member.

65. *Declaration of chairman conclusive.*—At any general meeting (unless a poll is demanded in writing on or before the chairman's declaration next hereinafter referred to, by at least five members personally present, or by a member or members holding or representing by proxy or entitled to vote in respect of at least one-tenth of the nominal amount of the capital represented at the meeting) a declaration by the chairman that a resolution has been carried or carried by a particular majority, or lost or not carried by a particular majority, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

VOTES OF MEMBERS.

71. *Voting power.*—Subject to any special terms as to voting upon which any shares may have been issued, or for the time being be held, every member of the company, upon a show of hands, shall have one vote,

and upon a poll one vote for every share held by him of any class.

74. *Proxies.*—Votes may be given personally or by proxy. The instrument appointing a proxy shall be in writing, under the hand of the appointer, or if such appointer is a corporation, under its common seal. No person shall be appointed a proxy who is not a member of the company, and qualified to vote, except that a corporation holding shares conferring the right to vote may appoint one of its officers or members its proxy although not a member of the company.

DIRECTORS.

80. *Number of directors.*—Unless and until otherwise determined by a general meeting, the number of directors shall not be less than three or more than seven. The continuing directors may act, notwithstanding any vacancy in their body, but so that if the number falls below the minimum fixed by the regulations of the company for the time being, the directors shall not, except for the purpose of filling up vacancies or summoning a general meeting of the company, act so long as the number is below the minimum.

83. *Remuneration.*—The directors (other than the managing director, if any) shall receive, by way of remuneration in respect of each financial year of the company, fifty guineas per annum for each director, with an addition of fifty guineas per annum for the chairman, and a sum equal to five per cent. of the net profits of the company divided amongst the members in that year. In addition to their remuneration the

directors shall be paid all travelling and other expenses incurred while on the business of the company.

84. *Qualification.*—The qualification of a director shall be the holding of 300 shares of the company. A director may act before acquiring his qualification, but if not already qualified, shall acquire the same within two months from his appointment.

85. *When office of director vacated.*—The office of director shall be, *ipso facto*, vacated:

(a) If he become bankrupt, or suspend payment, or file a petition for liquidation of his affairs, or compound with his creditors.

(b) If he be found a lunatic or become of unsound mind.

(c) If he absent himself from the meetings of the directors for a period of six months without special leave of absence from the directors, unless he is absent on the business of the company, or if he fails to attend at least one half of the board meetings held in any year.

(d) Etc.

86. *Directors interested in contracts with company.*—No director, or intended director, and no person standing in a fiduciary capacity or position to the company shall be disqualified by his office from contracting with the company, either as vendor, or otherwise, nor shall any such contract, or any contract or arrangement entered into by or on behalf of the company, with any company, or partnership of or in which any such director or person shall be a member, or otherwise interested, be avoided, nor shall

any director or person so contracting or being such member, or so interested, be liable to account to the company for any profit realised by any such contract or arrangement by reason only of such director holding that office, or of the fiduciary relation thereby established. Provided that the fact of his being interested therein, and the nature of his interest, shall be disclosed by him to the meeting of the directors at which the contract is determined on if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and except in respect of the agreement referred to in Article 3 hereof, no director shall vote in respect of any such contract or arrangement, and if he do vote his vote shall not be counted. A general notice that a director is a member of any firm or company, and is to be regarded as interested in all transactions with such firm or company shall be sufficient disclosure under this Article, and after such general notice shall have been given it shall not be necessary to give any special notice or notices relating to any particular transaction with such firm or company.

ROTATION OF DIRECTORS.

87. *Retirement of directors.*—At the annual general meeting to be held in the year 1913, and at the annual general meeting in each succeeding year, one-third of the directors, or if their number is not a multiple of three then the number nearest to, but not exceeding one-third of the directors, shall retire from office.

99. *Acts valid, notwithstanding defective appointment.*—All acts done at any meeting of the directors, or of a committee of directors, or by any person acting

as a director, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified or that their or any of their offices were for any reason vacated, be as valid as if every such person had been duly appointed, and was qualified to be a director.

Powers of Directors.

106. *General powers.*—The management of the business of the company shall be vested in the directors, who may exercise all such powers of the company as are not hereby, or by statute, expressly directed or required to be exercised by the company in general meeting, subject nevertheless to any regulations of these Articles, and to the provisions of the Companies Act, and to such regulations not being inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Managing Directors.

108. *Power to appoint.*—The directors may, from time to time, appoint one or more of their body to be managing director or managing directors of the company, either for a fixed term, or without any limitation as to the period for which he or they are to hold such office, and may, subject to any contract between

him or them and the company, from time to time, remove or dismiss him or them from office, and appoint others in his or their place.

DIVIDENDS.

113. *Dividends.*—The company in general meeting may (subject to any preference or priority for the time being existing and subject to the provision hereinafter contained), declare a dividend to be paid to the members in proportion to the amount paid up or credited as paid up on the shares. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.

114. *Only out of profits.*—No dividend shall be payable except out of the profits arising from the business of the company. The declaration of the directors as to the amount of the net profits of the company shall be conclusive.

REGISTERS.

119. The company shall keep registers of members, directors, and mortgages as required by sections 25, 75, and 100 respectively of the Companies Act and shall make the returns required by section 26 of the Companies Act (*h*).

ACCOUNTS.

122. *Proper accounts to be kept.*—The directors shall cause true accounts to be kept of the sums of money received and expended by the company, and all matters in respect of which such receipt and expenditure take

(*h*) Clauses of this character are frequently inserted to act as reminders to the officers of the company.

place, and of the assets, credits and liabilities of the company. Such of the books of account as shall be in the United Kingdom shall be kept at the registered office of the company, or at such other place or places as the directors think fit.

Names, Addresses, and Descriptions of Subscribers.
John Jones, of .
William Smith, of .
Thomas Brown, of .
Benjamin Green, of .
Andrew Black, of .
Arthur Drew, of .
John Smith, of .

Dated this 4th day of February, 1924.

Witness to all the above written signatures,

GEORGE BROWNE.

CHAPTER IV.

THE ARTICLES OF ASSOCIATION.

BEFORE reading this Chapter, read the form of Articles of Association on the last sixteen pages, which Articles are actually in use by an existing company. (Owing to the length of the whole document, only the more important and instructive clauses are set out.)

The Articles must be printed and signed by the same persons as signed the Memorandum, with at least one witness, and stamped as a deed.

It is not necessary to have Articles. If there are none, a form of Articles set out in the First Schedule to the Companies Act and called **Table A** applies, and becomes the Articles of the company.

The **regulations** of a company are the Articles, together with any special resolutions passed by the company. That is to say, the regulations which the members are under a statutory covenant to observe.

The Articles **bind the company and the members** thereof to the same extent **as if they had been signed and sealed by each member and contained covenants by each member to observe them** (*a*), and any new regulations are as binding as if they had been originally inserted in the Articles (*b*).

(*a*) Companies Act, s. 14.
(*b*) Companies Act, s. 13.

Result.

(1) Each member is bound to the company;

(2) Each member is bound to the other members;

Borland v. Steel Bros., [1901] 1 Ch. 279.

The Articles, as altered, provided that the shares of any member who became bankrupt should be sold to certain persons at a certain price. B. became bankrupt. His trustee claimed that he was not bound by the altered article:—**Held,** the Articles, as altered in the proper way, **are a personal contract between B. and the rest of the members,** and B. and his trustee are bound (*c*).

(3) Neither the company nor the members are bound to outsiders;

Eley v. Positive, etc., Co. (1876), 1 Ex. D. 88.

The Articles provided that E. should be employed as solicitor for the company. The company employed other solicitors. E. sued the company for breach of contract:—**Held,** there was no contract with E. and he could not sue.

The company is **only** bound to the members to a limited extent; for the company is only bound "as if the **members** had signed," and the signature of the members cannot bind the company. *Hickman* v. *Kent or Romney Marsh Association*, [1915] 1 Ch. 881, at p. 897.

But the company may be liable on an implied contract in the terms of the Articles.

New British Iron Co., [1898] 1 Ch. 324.

Article 62 provided that the remuneration of the directors should be £1000. A director sued the company for his fees:—**Held,** "the Article is not in itself a contract between the company and the directors: it is only part of the contract constituted by the Articles between the members of the company *inter se.* . . .

(*c*) And see *Attorney-General* v. *Jameson*, [1904] 2 I. R. 646.

"But where, on the footing of that Article, the directors are employed by the company and accept office, the terms of Article 62 are embodied in and form part of the contract between the company and the directors."

The Articles are subject to the Memorandum, and cannot give powers which are not given by the Memorandum. But for purposes of construction on points which need not necessarily be put in the Memorandum, they are to be read together, and the Articles may then explain or amplify the Memorandum (*London Financial Association* v. *Kelk* (1883), 26 Ch. D. 107).

The Articles must not contain anything illegal or ultra vires the company.

Any Article which is the same in substance as any Article in Table A, cannot be void on these grounds (*Lock* v. *Queensland Investment Co.*, [1896] A. C. 461).

The Articles can be altered by the company, **by a special resolution** at **a general meeting.**

I.e., a resolution passed by a three-quarters majority of those present at a meeting of which due notice has been given, and confirmed at another meeting (two weeks to one month later), by a simple majority of those present (*d*).

The company may freely alter its articles, provided:

(1) **The altered articles do not contain anything illegal.**

(2) **They do not go outside the powers given by the Memorandum.**

It was at one time held (in *Hutton* v. *Scarborough Cliff Hotel Co.* (1865), 2 Drew. & Sm. 521), that if the

(*d*) Companies Act, s. 69.

alteration altered the constitution of the company, it was void. But this was overruled in

Andrews v. Gas Meter Co., [1897] 1 Ch. 361.

The Memorandum provided that the capital of the company should be £60,000 divided into 600 shares of £100 each. Power was given to increase the capital, but there was no power in the Memorandum or Articles to issue preference shares. The Company, by special resolution, altered its Articles so as to give itself power to issue preference shares, and issued them:—**Held**, the issue was good. If this had been forbidden by the Memorandum it could not be done: but if not, it is immaterial that the change quite alters the composition of the company.

And (3). **The alteration does not constitute a fraud on the minority.**

Thus, if there were 1000 shares of £1 each, ranking equally as to dividend, a resolution that shares numbered 1 to 800 should bear three times as much dividend as the others, would be bad.

Menier v. Hooper's Telegraph Works (1874), L. R. 9 Ch. 350.

The majority of the members of Company A. were also members of Company B., and at a meeting of Company A. they passed a resolution to compromise an action against Company B. in a manner favourable to B. but unfavourable to A.:—**Held**, the minority of Company A. can have the compromise set aside (*e*).

The result appears to be that any change within the powers of the Memorandum will be allowed, subject to this limit, that the majority cannot alter the regulations so as to sacrifice the interests of the minority without a reasonable prospect of advantage to the company as a whole.

(*e*) And see *Punt* v. *Symons & Co.*, [1903] 2 Ch. 506; and *Marshall's Valve Gear Co.*, [1909] 1 Ch. 267; and cf. *Neale* v. *City of Birmingham Tramways*, [1910] W. N. 175.

Brown v. British Abrasive Wheel Co., [1919] 1 Ch. 290.

A large majority of the shareholders wished to buy up the minority with a view to extending its capital. The minority refused to sell, and the majority then passed special resolutions altering the Articles so as to enable nine-tenths of the shareholders to buy out any other shareholder. **Held,** the alteration of the Articles could be restrained. (*ee*)

Where the capital is divided into different classes of shares (*f*), the Articles usually provide that the special rights of each class may be altered with the consent of a certain majority of the shareholders of that class. Where this is not done, there is some doubt as to how far the company in general meeting can alter the rights of any class of shareholders, without the consent of that class. Every shareholder when he takes his shares is presumed to know that his rights may be altered by special resolution. On the other hand, the class of shareholders who form the majority could not alter the Articles simply for the purpose of depriving the smaller class of their rights.

E.g. if the capital were divided in 1000 6 per cent. preference shares and 4000 ordinary shares, the holders of the ordinary shares would not except in very special circumstances be allowed to reduce the preference dividend to 3 per cent. It would in such a case be extremely difficult for the ordinary shareholders to prove that such a reduction was necessary for the benefit of the company as a whole, and was not made for the purpose of benefiting themselves at the expense of the preference shareholders.

But an arrangement which benefits the company may be allowed, even though it is unfair to individual shareholders.

Allen v. Gold Reefs, Limited, [1900] 1 Ch. 656.

The Articles gave the company a lien on all shares "not fully paid up," for calls due to the company. A. was the only holder of fully paid shares, he also owed money to the company for calls due on other shares. A. died. The company altered its Articles by striking out the words "not fully paid up," and thus gave itself a lien over all A.'s shares:—**Held,** this was good. The power must be exercised for the benefit of the company as a whole.

(*ee*) Followed in *Dafen Tin Plate Co.* v. *Llanelly Steel Co.*, [1920] 2 Ch. 124.

(*f*) See p. 123, *post.*

"I can see no reason for judicially putting any other limit on the power": LINDLEY, M.R.

The majority may even take power to exclude the minority where this is done *bonâ fide* for the benefit of the company.

Sidebottom v. Kershaw, Leese & Co., [1920] 1 Ch. 154.

The articles were altered so as to enable the directors to require any shareholder *who was competing with the company* to transfer his shares at their full value. **Held,** this alteration was valid.

A company cannot deprive itself of its powers to alter its regulations (*Andrews* v. *Gas Meter Co.*, see p. 49).

And it cannot by altering its articles justify a breach of contract with third parties.

I.e. a company cannot avoid its liabilities under a contract made with persons who are not members of the company by altering its Articles (*British Equitable Co.* v. *Baily*, [1906] A. C., at p. 36; *British Murac Syndicate*, [1915] 2 Ch. 186).

Provisions in the Articles restricting the rights of aliens may not be altered without the consent of the Board of Trade. (Companies (Foreign Interests) Act 1917, 7 & 8 Geo. 5, c. 18.)

An alteration not made in the proper way is not complete, but may have some effect.

Muirhead v. Forth Mutual Insurance Co., [1894] A. C. 72.

An insurance company purported to alter its Articles by adding that every policy should contain a certain clause. The alteration was not properly made, but the new Article was indorsed on every policy, which was made "subject to the Articles":—**Held,** a policy holder was bound by the Article.

The Memorandum and Articles are registered with the Registrar (*g*) at Somerset House, and may be inspected by **any one** on payment of a small fee (*h*), but only **members** of the company are entitled to have a copy. The company may charge 1*s.* for the copy (*i*).

(*g*) Companies Act, s. 15. (*h*) *Ibid.*, s. 243 (6).
(*i*) *Ibid.*, s. 18.

The result of this publicity is that any one who deals with the company is deemed to have notice of the contents of the Memorandum and Articles, and therefore of the powers of the company and the directors; and if any one deals with the company in matters which are inconsistent with the powers so given, he must take the consequences.

But so long as the act done is not inconsistent with the Memorandum and Articles, **an outsider is not bound to inquire whether all the necessary steps have been taken.** That is, he is entitled to assume that the directors have acted properly.

This is called **the Rule in the Royal British Bank v. Turquand** (1856), 6 E. & B. 327.

The directors issued a bond to T.—they had power to issue bonds **if authorised by special resolution.** No resolution had been passed:— **Held,** T. could sue on the bond. He was entitled to assume that a resolution had been passed.

"Persons dealing with the company are bound to read the registered documents, and to see that the proposed dealing is not inconsistent therewith. But they are not bound to do more; they need not inquire into the regularity of the internal proceedings."

Duck v. The Tower Galvanising Co., Limited,
[1901] 2 K. B. 314.

R., who had business assets of the value of £100, and debts of the same amount, formed his business into a company. R. continued to carry on the whole business of the company, and without any meeting issued debentures to D. for £500 under the seal of the company. The regulations gave power to issue debentures:—**Held,** D. was entitled to assume that the debentures were valid, and he thus had priority over the other creditors. (*k*)

But if the person dealing with the company has notice of the irregularity, he is affected by it (*Howard* v. *Patent Ivory Co.* (1888), 38 Ch. D. 156, at pp. 170, 171).

(*k*) See also *Dey* v. *Pullinger Engineering Co.* [1921], 1 K. B. 77, where it was held that the company was bound by a bill of exchange drawn by its managing director, though he had not in fact authority to draw the bill.

CHAPTER V.

FORMATION OF A COMPANY.

Section 1.

The Preliminary Contract.

Very frequently a company is formed for the purpose of purchasing an existing business or property: then the promoters of the company are in this difficulty, they do not want to go to the expense of forming the company until they have a binding contract from the owner of the business (or vendor) to sell it to the company; but, on the other hand, the company cannot make a binding contract until it is incorporated.

Sometimes a preliminary contract is made between the vendor and some person who acts **as agent or trustee** for the company about to be formed.

The position of the agent is curious, because a person cannot act as an agent for another person who is not yet in existence; therefore—

(1) **The company,** when it comes into existence, **is not bound by the contract.**

Re English & Colonial Produce Co., [1906] 2 Ch. 435.

A solicitor, on the instructions of persons who became the directors of the company, prepared the Memorandum and Articles before its formation :—**Held,** the company was not liable to pay

the solicitor's costs, although it had taken the benefit of his work (see the judgment of VAUGHAN WILLIAMS, L.J., at p. 441 (*a*)).

(2) **The company cannot sue the vendor on the contract.**

Natal Land Co. v. Pauline Colliery Syndicate, Limited, [1904] A. C. 120.

The N. Company agreed with Mrs. C., as agent of the Pauline Syndicate before its formation, that the company would grant a lease of a mine to the syndicate. The syndicate was registered, and discovered a seam of coal. The company refused to carry out the contract:—**Held**, there was no binding contract between the company and the syndicate.

And (3) **The agent remains personally liable on the contract, even if it is afterwards ratified by the company** (*Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174).

Hence it is usual to provide in the contract that

(a) If the company adopts the agreement, the agent's liability shall cease; and

(b) If the company does not adopt the agreement within (say) two months, either party may rescind the contract; so that the agent escapes liability in either event. Then, as soon as the company is incorporated, it enters into a **new agreement** with the vendor to carry out the terms of the preliminary agreement.

Such a new agreement may be implied by the acts of the company (see *Natal Land Co.* v. *Pauline Colliery Syndicate*, [1904] A. C., at p. 126).

(*a*) Expenses of registration cannot be recovered from the Company in the absence of an express or implied request on the part of the Company that they should be paid (*National Motor Mail Coach Co.*, [1908] 2 Ch. 515).

Note, that the agent could probably sue the vendor on the contract and recover damages, if he has suffered any.

If the contract was made with a "Trustee" for the company, the position is similar; for a trustee is personally liable on contracts which he makes on behalf of the beneficiary, and the company is not bound by the contract and cannot enforce it or ratify it; since the person who purported to act as trustee for the company before it was formed could not have had any authority to do so (*b*).

As a consequence of these difficulties it is now becoming the more usual practice not to make any contract before the company has been incorporated; but to agree the form of a draft contract to be entered into by the vendor and the company after incorporation.

SECTION 2.

Registration.

(a) New Companies.

Persons wishing to form a new company must produce to the Registrar of Companies

(1) The Memorandum of association (*c*).

(2) The Articles of association (*c*).

(3) A list of the persons who have consented to become directors (*d*).

(4) A statutory declaration that the requirements of the Act have been complied with (*e*).

The proper stamp duties must be paid and the

(*b*) *Northumberland Avenue Hotel Co.*, 33 Ch. D. at p. 20.
(*c*) Companies Act, s. 15.
(*d*) Companies Act, s. 72 (2).
(*e*) Companies Act, s. 17 (2).

Registrar enters the name of the company on the register.

The company then comes into existence; but it cannot commence business until it has complied with section 87 of the Companies Act (see p. 70), unless it is a private company (see Chapter XVII.).

(b) Existing Companies.

Any company which existed before the Companies Act (1862) may be registered under the Companies Act (*f*), if it has seven members, except—

(1) an unregistered company after a winding up has commenced (*Hercules Insurance Co.* (1871), 11 Eq. 321);

(2) companies (other than joint stock companies) in which the liability of members is limited by Act of Parliament.

Existing companies are not bound to register under the Act.

Form.

Such a registration can take place with the consent of a three-quarters majority of members present at a general meeting of the company (*g*), and the following information must be supplied to the Registrar :—

1. A list of members.
2. A copy of the charter or deed of settlement of the company.
3. The amount of the nominal capital.
4. The number of shares.
5. The name of the company, with the addition of the word "limited" (*h*).

(*f*) Companies Act, s. 249.
(*g*) Companies Act, s. 249 (2).
(*h*) Companies Act, s. 252.

SECTION 3.

The Certificate of Incorporation.

When the Memorandum has been signed and the fees paid, the registrar enters the name of the new company in the register, and hands over a certificate of incorporation in the following form:

"I hereby certify that Blank Company, Limited, is this day incorporated under the Companies (Consolidation) Act, 1908, and that the company is limited." —Given under my hand at London this 4th day of February, 1910.

The certificate is conclusive.—By the Companies Act, 1862, s. 18, the certificate was declared to be conclusive evidence that the Act had been complied with. But doubts arose on the construction of this section, and it was held that if it was legally impossible that the company could have been properly registered, the court could go behind the certificate, and hold that there never had been a company.

National Debenture Co., [1891] 2 Ch. 505.

Held, if only six members really signed the Memorandum, the certificate would not be conclusive.

This was doubted in *Ladies' Dress Association* v. *Pulbrook*, [1900] 2 Q. B. 381.

In order to avoid such doubts, the wording of section 18 was altered, and now the certificate is conclusive evidence that all the requirements of the Companies Act, in respect of **registration and of matters precedent and incidental** thereto have been complied with, and that the association is a company **authorised to be registered, and duly registered** under the Companies Act (*i*).

(*i*) Companies Act, s. 17, replacing s. 1 of the Act of 1900. See also *Re Walker & Smith, Limited* (1903), 88 L. T. 792, where an invalid reduction of capital was held valid because the registrar had certified it.

The certificate is conclusive evidence that the company was formed on the date appearing on the certificate, and the company is taken to have been in existence during the whole of the day. (*j*)

A company registered out of the United Kingdom (*k*) must file with the registrar

(a) a copy of its charter or memorandum and articles;

(b) a list of directors;

(c) the name of a person on whom process may be served;

(d) an annual summary (see p. 93).

(*j*) *Re Jubilee Cotton Mills*, [1923] 1 Ch. 1.
(*k*) Companies Act, s. 274.

CHAPTER VI.

THE PROMOTER AND THE PROSPECTUS.

Section 1.

The Promoter.

The term "promoter" is not a term of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is brought into existence (*a*).

A **promoter** is "one who undertakes to form a company with reference to a given object, and to set it going, and who takes the necessary steps to accomplish that purpose" (*b*). He is not a trustee or agent for the company, for it has not yet come into existence; but he stands in a fiduciary relation towards it and is liable to refund secret profits, etc., in the same way as a director.

If, therefore, the promoter wishes to sell his own property to the company, he should either (i.) see that there is a board of independent persons appointed as directors of the new company, or (ii.) he should disclose all the facts to the public by means of a prospectus.

(*a*) *Whaley Bridge Co.* v. *Green* (1879), 5 Q. B. D. 111.
(*b*) *Twycross* v. *Grant* (1877), 2 C. P. D. 541.

A promoter cannot relieve himself of this liability by provisions to that effect in the Articles of the company (*d*).

If he acquires property after he has taken up the position of a promoter for a company, the facts may show that he acquired it as a trustee for the company, but apart from such facts, he may sell it to the company at a profit, provided he makes the proper disclosure (*d*).

SECTION 2.

The Prospectus.

A **prospectus** is usually a circular sent round by the promoters after the formation of the company to induce the public to take shares in the company. It is defined in the Companies Act as "any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company" (*e*).

The object of a promoter in issuing a prospectus is to make it as attractive as possible.

The object of the legislature is to prevent the public from being misled and defrauded.

The promoter must take great care—

1. **Not** to make any untrue statements, because—
   (a) an allotment of shares may be set aside for fraud or misrepresentation; and
   (b) he may be sued for damages for fraud; and
   (c) he may be sued for compensation for mis-

(*d*) *Omnium Electric Palaces, Ld.* v. *Baines*, [1914] 1 Ch. 332, at p. 347.
(*e*) Companies Act, s. 285, as to what is an issue to the public, see p. 228.

representations under section 84 of the Companies Act, which replaces the Directors' Liability Act, 1890.

2. **To disclose** all matters which he is bound to disclose by the Companies Act.

As to 1. Untrue statements. (a).—Rescission for fraud or misrepresentation.

Fraud.—A contract to take shares is governed by the same rules as other contracts, and therefore any person **induced by fraud** to take shares may rescind the contract, and have his name struck off the register But he cannot both retain the shares and get damages (*Houldsworth* v. *Glasgow Bank* (1880), 5 App. Cas. 317).

Misrepresentation.—Any person who takes shares on the faith of statements contained in a prospectus may set aside the contract and apply to be struck off the register if those statements are false, even though they were made innocently.

But he must apply—

(1) within a reasonable time; and

(2) before proceedings to wind up the company have been commenced.

The misrepresentation need not be the **sole** reason which induced the applicant to apply for shares, if he really acted upon the misrepresentation (*Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459).

Statements of **opinion** or exaggerated views of the advantages of a company are not enough to upset a contract to take shares.

But if they are so gross that, taking the whole thing together, there was really a misrepresentation of fact, the contract may be set aside.

Greenwood v. Leather Shod Wheel Co., [1900] 1 Ch. 421.

The prospectus stated in large type, "orders have already been received from the House of Commons," and "wheels for the trolleys in the House of Commons have been ordered, and are now in use."

In fact, the person who supplied refreshments to the House had one trolley with these wheels, but not ordered by the House of Commons:—**Held**, the prospectus was fraudulent and the contract void.

The prospectus is often **based upon the report of an expert** who has examined the property. If this report contains false statements of fact, a shareholder who relies on them may rescind his contract to take shares, if the directors have invited subscriptions for shares on the faith of the statements in the report, unless the directors have **clearly warned the public that they do not vouch for the accuracy of the report** (*g*).

Concealment in a prospectus may amount to fraud, but only if it is such a concealment as implies a falsehood (*h*).

(b) Damages for fraud.

In *Derry* v. *Peek* (1889), 14 App. Cas. 337, it was held that a director was not liable in damages for false statements in a prospectus if he honestly believed them

(*g*) *Mair* v. *Rio Grande Rubber Estates*, [1913] A. C. at p. 872. *Pacaya Rubber Co., Ld.*, [1914] 1 Ch. 542. *Reese River Silver Co.*, L. R. 2 Ch. 604.

(*h*) See *Christenville Rubber Estates*, [1911] W. N. 216, and *Shepheard* v. *Broome*, [1904] A. C. 342.

to be true, even though there was **no reasonable ground for his belief**; for the common law action of deceit will not lie unless "a man makes a statement to be acted upon by others, which is false, and which is **known by him to be false or is made by him recklessly** or without care whether it is true or false" (see p. 350 of the report).

In *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, it was held that the directors were not liable for false statements in a prospectus to a person who had bought shares from the persons to whom they had been originally allotted by the company, unless the prospectus was directly communicated to him by the company; because the prospectus was only addressed to the original allottees and not to subsequent purchasers of the shares.

These rules still remain the law as to fraud or deceit generally; but after these decisions directors and promoters were subjected to the special liability in respect of compensation mentioned below.

(c) Compensation under section 84.

A **director or promoter is liable to compensate any persons who subscribe for shares on the faith of a prospectus** for damage sustained by reason of any untrue statement in it, unless—

(i.) he had reasonable grounds for believing it to be true; or

(ii.) he made the statement upon the authority of an expert whom he had reasonable grounds for believing to be competent; (*i*) or

(*i*) Directors are not entitled to rely on the statements of the vendor as an expert, *Adams* v. *Thrift*, [1915] 1 Ch. 557; affirmed by C. A., [1915] 2 Ch. 21.

(iii.) the statement was a correct copy of an official document.

If a director dies, no action under this section can be brought against his personal representatives, *Geipel* v. *Peach*, [1917] 2 Ch. 108.

N.B.—A shareholder can often obtain rescission of his contract to take shares in cases where he cannot make the directors liable for damages or compensation.

As to 2.—Matters which must be disclosed.

These are now contained in the Companies Act, s. 81.

The abuses intended to be remedied by the legislature were—

1. Material facts were frequently suppressed.

2. The directors often had no stake at all in the company.

3. Many companies proceeded to business, even if only a few of the shares had been taken up and the company failed for want of sufficient capital.

4. Much of the money subscribed went to pay purchase money inflated by profits of some syndicate who sold the property to the promoters.

The legislature has attempted to remedy these abuses by the following provisions:—

(a) **If the company issues a prospectus,** then the prospectus must be dated, a copy must be signed by every director or proposed director (*k*), and filed with the registrar, and the prospectus must state on the face of it that a copy has been so filed.

The prospectus must state (*l*)—

(a) **The contents of the Memorandum,** with the names,

(*k*) S. 80. Penalty, £5 per day. (*l*) S. 81.

descriptions, and addresses of the signatories, and the number of "founders" or deferred shares (if any).

*(b) **The number of shares (if any) fixed by the Articles as the qualification of a director and the remuneration of the directors.**

*(c) **Names, descriptions, and addresses of directors.**

(d) **The minimum subscription** on which the directors may proceed to allotment (see p. 69), and in case of a second or subsequent offer of shares, the amount offered on each previous allotment within the past two years and the amount allotted and the amount paid on the shares allotted (*m*).

(e) **The number of shares or debentures issued as fully or partly paid up otherwise than in cash.**

(f) **The names and addresses of the vendors and the amount payable to each.**

(g) **The amount of the purchase money, specifying the amount paid for goodwill.**

(h) **The amount of the underwriting commission (if any).** (See p. 185.)

*(i) **An estimate of the preliminary expenses.**

(j) **The amount paid to any promoter,** and the consideration for such payment.

(k) **The date of and parties to any material contract** and a reasonable place where it may be inspected; but not if made—

(1) in the ordinary course of the company's business; or

(2) more than two years before the issue of the prospectus.

(l) **Names and addresses of the auditors (if any).**

*(m) **The interest of every director or promoter** in the promotion of or the property to be acquired by the company, and any sums paid to him to induce him to become or to qualify him as a director.

(n) **Where the shares are of more than one class, the rights of voting attached to the several classes of shares.**

(*m*) Default in disclosing the amount of previous allotments does not entitle an allottee to rescind his contract. *South of England Gas Co.*, [1911] 1 Ch. 573.

The requirements of this section are set out in full in the appendix.

If a prospectus is issued more than one year after the company is entitled to commence business, then—

(1) none of the provisions marked * on p. 65 apply; and

(2) contracts made more than two years before the prospectus need not be disclosed.

Any condition binding the applicant to waive the provisions of this section is void.

A director is not liable if—

(1) he did not know of the matter not disclosed; or

(2) the non-compliance arose from an honest mistake of fact on his part. Otherwise he is probably guilty of a misdemeanour, and liable in damages to the members of the company.

B. If the company does not issue a prospectus.

The company must file with the registrar a "**statement in lieu of prospectus**" (*n*) containing most of the information which would be required in the prospectus, in the form prescribed in the Second Schedule to the Companies Act (see Appendix A, p. 301).

If the company fails to file a statement in lieu of prospectus, it cannot allot any shares or debentures, and the allotment, if made, would be void (*n*).

The Companies Act is silent as to the effect of untrue statements in the statement in lieu of prospectus, but apparently

(*n*) Companies Act, s. 82. *Re Jubilee Cotton Mills*, [1923] 1 Ch. 1. This does not apply to a private company.

(1) **If a person applying for shares inspects the statement in lieu of prospectus, the statement becomes the basis of the contract between him and the company,** and if it contains a false statement, he may have a right to rescind (*o*).

(2) A person who takes his shares not from the company, but from the person to whom they were allotted, has no remedy against the company (*p*).

(3) A person who subscribes for shares on the faith of a statement in lieu of prospectus cannot claim compensation under s. 84 (*q*).

(4) Any person who wilfully makes a false statement in a statement in lieu of prospectus is guilty of a criminal offence (*r*).

(5) All allotments of shares and debentures are not necessarily void merely because the contents of the statement are untrue or misleading (*s*).

The effect of the disclosures required by the Act is shortly as follows :—

(*a*) *The Contents of the Memorandum.* This shows the objects of the company and the amount of capital.

(*b*) *The qualification of the Directors.*

This shows how far the directors are prepared to put faith in the company themselves.

It is usual to provide that no person shall be qualified to act as director unless he holds a certain number of shares. (See Art. 84 in the Form on p. 41.)

(*o*) *Blair Open Hearth Co.*, [1914] 1 Ch. 390, at p. 401.
(*p*) *Peek* v. *Gurney*, L. R. 6 H. L. 377 (cited p. 63, *ante*).
(*q*) See p. 63, *ante*.
(*r*) Companies Act, s. 281.
(*s*) *Blair Open Hearth Co.*, [1914] 1 Ch. 390.

These sections do not make it **necessary** for the company to fix any such qualification; but, if there is none, any person reading the prospectus can see that the directors have no personal interest at all in the success of the company.

(*c*) By s. 72.—**A person cannot be appointed a director** of the company by its articles or **named as such in the prospectus** unless he has

(1) signed a consent to act, and

(2) signed the Memorandum for his qualification shares or a contract to take such shares **from the company** (*i.e.*, not as a present from the promoters).

This applies only to companies which invite the public to take shares, and probably does not apply to a prospectus sent to existing shareholders or debenture holders only (*Burrows* v. *Matabele Gold Co.*, [1901] 2 Ch. p. 27).

The result of non-compliance is not stated in the Act. Probably the appointment is void, and the person responsible has committed a misdemeanour and is liable in damages (*t*).

By s. 73.—**A director must take up his qualification shares within two months**; and if he ceases to hold them, he vacates office.

(*d*) **The Minimum Subscription.**

The directors or promoters must determine beforehand what is the minimum amount of capital with which they can successfully carry on the business of the company. This is called the "**minimum subscription.**"

The amount (*u*) **of the minimum subscription**

(*t*) Rawlins and Macnaghten, p. 203.

(*u*) "10 per cent. of the shares offered" is a sufficient statement of the amount (*West Yorkshire Darracq Co.*, [1908] W. N. 236).

must be stated in the prospectus (*x*) **or in the statement in lieu of prospectus.**

A business cannot as a rule be successfully worked without a certain amount of capital, and if a company starts with insufficient capital it is almost sure to meet with failure. Notwithstanding this, promoters of companies who had failed to obtain the necessary capital from the public, frequently persisted in the formation of the company, and thus caused almost inevitable loss to the persons who had subscribed for shares.

By s. 85.—**No shares offered to the public are to be allotted until the "minimum subscription" has been subscribed** and the amount due on application (which must not be less than five per cent. of the value of each share) has been **paid in cash.**

Mears v. Western Canada Pulp Co., [1905] 2 Ch. 353.

Directors allotted shares when the exact amount of the minimum subscription had been subscribed and the amounts due on application had been paid by **cheques**; some of the cheques were not paid:—**Held,** the allotment was bad.

The company need not fix any minimum subscription: but if it does not, or if none is stated in the prospectus, or in the statement in lieu of prospectus, **the whole capital** must be subscribed before any shares are allotted.

If the minimum subscription has not been subscribed within 40 days after the issue of the prospectus, all money received from applicants must be repaid, and if it is not repaid within 48 days after the issue of the prospectus, the directors become liable to repay it with interest at 5 per cent., unless they can prove that the loss of the money was not due to their negligence or misconduct (*y*).

On any allotment of shares after the first allotment of shares offered to the public, the amount paid on application must not be

(*x*) The prospectus is for the purpose the particular prospectus on which the applicant relies (*Roussell* v. *Burnham*, [1909] 1 Ch. 127).
(*y*) S. 85 (4).

less than five per cent., but the rest of this section does not apply.

This section does not apply to the allotment of debentures, or to a private company.

Any clause in the prospectus waiving the provisions of this section is void (*z*).

By s. 87.—**The company cannot commence business until** (a) **the amount of the minimum subscription has been subscribed** (*a*), (b) every director has paid on every share, which he is liable to pay for in cash, the same amount as members of the public must pay on application and allotment, (c) a statutory declaration has been made to this effect, and (d) if there is no prospectus, a statement in lieu of prospectus has been filed.

Contracts made by the company before it has become entitled to commence business are provisional only, and do not become binding **on the Company** (*b*) until it has become entitled to do so.

This includes preliminary contracts which have been adopted by the company; and probably even the contract of the signatories of the Memorandum to take shares in the company is void if the company never obtains the minimum subscription (*Re Otto Electrical Co.*, [1906] 2 Ch. 390).

(*e*) **Shares and debentures issued for a consideration other than cash** (see pp. 86 and 87).

(*f*) **The names of the vendors and the amounts payable to them.**

The purchase money paid to each vendor must be disclosed in the prospectus whether he sells directly to the company or sells to other persons who sell to the

(*z*) S. 85 (5). (*a*) Penalty, £50 per diem.
(*b*) S. 87 (3). These words seem to imply that the contract is binding on the parties other than the company.

company. In the latter case the purchase money paid to each vendor must be shown.

A person is a vendor under this section if he has entered into any contract, absolute or conditional, to sell or buy or for an option to buy any property to be acquired by the Company, and

(*a*) the purchase money is not fully paid when the prospectus is issued;

or (*b*) the purchase money is payable wholly or partly out of the proceeds of the issue of shares offered by the prospectus;

or (*c*) the contract depends on the result of that issue (*c*).

Brookes v. Hansen, [1906] 2 Ch. 129.

In May, 1901, Wheeler agreed to sell certain patent rights to a syndicate for £15,000. This sum was paid to Wheeler before the end of May. On June 1st, 1901, the syndicate agreed to sell the patents to a company for £58,500 and the company issued a prospectus on the same day which did not refer to the contract between Wheeler and the syndicate:—**Held**, Wheeler was not a vendor, and this contract need not be set out.

Held also, that if the £15,000 had not been paid to Wheeler before June 1st, 1901, and the company had agreed to buy from the syndicate the **benefit of its contract** with Wheeler, then Wheeler would have been a vendor. The test seems to be whether any of the cash paid by the company is paid to the original vendor or not.

(*g*) The amount of the purchase money specifying the amount paid for goodwill.

It is very difficult to determine the value of the goodwill of a business, and large sums are often paid for goodwill which are soon afterwards written off as having been entirely lost.

(*c*) S. 81 (2).

(h) Underwriting Commission.

This sub-section only requires the amount or rate of commission to be stated. The dates of and parties to the underwriting contracts are also required under sub-s. (k), and if any director is interested in the underwriting, this should be disclosed under sub-s. (m).

Where the underwriting is undertaken by a company or syndicate, the Act does not require the capital of the syndicate to be stated. This has led to a practice under which the promoters or their friends form a syndicate with a capital so small that it could not possibly pay for the shares it agrees to underwrite, and consequently, if a large number of the shares are not taken up, the syndicate cannot pay the calls and the underwriting becomes a farce. Directors of a company should therefore insist that any syndicate which underwrites the shares must have a sufficient subscribed capital. If it has not, they may possibly be liable for negligence.

It is not necessary to disclose the commission paid to sub-underwriters.

See generally as to underwriting, Chapter XIII.

(i) An estimate of the preliminary expenses.

These expenses include the stamps payable on the formation of the company, legal costs and other expenses connected with the preparation of the Memorandum and Articles and other documents and advertising the prospectus.

(j) The **amount paid to any promoter.** As to promoters, see p. 59.

(k) The dates of and parties to every material contract.

A somewhat similar provision was contained in the Companies Act, 1867, s. 38, and was interpreted to include all contracts which imposed any obligation on the company, or which were entered into by promoters (or persons who afterwards became promoters) relating to the affairs of the company, and which were material for an intending shareholder to know.

Gluckstein v. Barnes, [1900] A. C. 240.

The old "Olympia" Company was in difficulties, and the debentures were worth very little. X. Y. and Z., as trustees for a syndicate, bought up a great number of debentures very cheap. Then they bought "Olympia" for £140,000, and sold to a new company for £180,000. The result of this was, that the debentures were paid in full out of the £40,000, and X. Y. and Z. made a profit on the debentures of £20,000.

X. Y. and Z. became directors of the new company. They disclosed their profit of £40,000, but not their profit of £20,000 —**Held**, there was not sufficient disclosure, and X. Y. Z. must pay the £20,000 to the company.

If any contract required to be disclosed by the Act of 1867, or by the Act of 1908 (*d*), is not disclosed, any person who has taken shares on the faith of the prospectus can claim damages from the directors who issued it; but only if he can show—

(1) that the undisclosed contract was a material one; and

(2) that he has suffered damage by its non-disclosure (*e*).

(l) The names and addresses of the auditors.

It is the business of the auditors to check the accounts of the company and report to the shareholders (see p. 223, *post*); it is therefore important that they should be reliable persons.

(m) The interest of every director in the promotion of or in the property proposed to be acquired by the Company.

If the director is a member of a firm, any such interest acquired by the firm must be disclosed.

(*d*) *Re Wimbledon Olympia, Limited*, [1910] 1 Ch. 630.
(*e*) *Nash* v. *Calthorpe*, [1905] 2 Ch. p. 237. And see *Macleay* v. *Tait*, [1906] A. C. 24; and *Marshall* v. *Morrison*, [1907] W. N. 29.

(n) Rights of voting at meetings.

If the shares are all of one class, the voting rights need not be disclosed.

If any matters required to be disclosed by this section are omitted, this does not give the shareholder a right to rescind his contract to take shares (except as regards the minimum subscription, (*f*) see p. 69 *ante*); but it may give him a right to recover any damages he has suffered from the persons responsible for the omission (*g*).

A "**waiver clause**" was sometimes used to defeat the provisions of some of the earlier Acts. A clause was inserted in the prospectus that applicants should waive the provisions of the section; but this "waiver clause" had to be straightforward and clear. If so, it was good and effectual to cover *bonâ fide* slips (*h*). If it was "tricky" it was void.

Greenwood v. Leather Shod Wheel Co., [1900] 1 Ch. 421.

The same prospectus as is mentioned on p. 62, contained the clause: "There may be contracts which perhaps ought to be referred to" . . . "any subscriber shall be deemed to have waived all rights to further particulars of these contracts":—**Held,** "the waiver clause is clearly tricky and fraudulent. It is printed in small type so as to escape attention. It is worded so as to conceal and not to afford notice of the contract of December 3rd to which the promoter was a party." The clause was void (*i*).

All such **waiver clauses are now void** (*j*).

An "**abridged prospectus**" is sometimes advertised in news-

(*f*) *Roussell* v. *Burnham*, [1909] 1 Ch. 127.
(*g*) *South of England Gas Co.*, [1911] 1 Ch. 573.
(*h*) *Macleay* v. *Tait*, [1906] A. C. 24.
(*i*) And see *Watts* v. *Bucknall*, [1903] 1 Ch. 766.
(*j*) Sect. 81 (4).

papers. Such a prospectus does not as a rule contain many of the disclosures required by the Act. Those who issue the prospectus attempt to protect themselves by stating that the prospectus is not an invitation to subscribe for shares, but an invitation to the public to apply for prospectuses, and the form of application attached to the advertisement is usually a form by which the applicant applies for a full prospectus.

It is probable, however, that such an "abridged prospectus" is really a "prospectus" within the meaning of the Act, and the provisions so elaborately framed are probably void as waiver clauses under section 81 (4).

This view is strengthened by the provisions of section 81 (5), which provides that if a prospectus is published as an advertisement, the contents of the Memorandum need not be set out. This seems to imply that all the other requirements of the section must be complied with.

If, therefore, the applicant reads and relies upon the abridged prospectus and does not read the full prospectus, there would be a considerable risk of his being able to recover from the directors any damage he has suffered (*k*).

Companies sometimes evaded these provisions by being registered outside the United Kingdom.

Any such company must now, if it has a place of business within the United Kingdom, file with the registrar a copy of its charter or Memorandum and Articles, a list of its directors, and the other matters set out in section 274 of the Companies Act.

Any company incorporated in a British possession which has filed these particulars may now hold lands in the same way as a company incorporated in England notwithstanding the Statutes of Mortmain (*l*).

The form given below is a form of prospectus actually used by an existing company (with some modification and omissions). The student should read this form and ascertain whether, and, if so, how, the provisions of the Act have been complied with.

(*k*) *Roussell* v. *Burnham*, [1909] 1 Ch. 127; *Army and Navy Society* v. *Craig* (1891), 8 T. L. R. 227.
(*l*) Companies Act, s. 275.

Form of Prospectus.

A copy of this prospectus has been filed with the Registrar of Companies.

BLANK COMPANY, LIMITED.

(Incorporated under the Companies (Consolidation) Act, 1908.)

Capital - - - - £140,000

Divided into

	£
14,000 6 per cent. cumulative preference shares of £5 each	70,000
14,000 ordinary shares of £5 each	70,000

Issue of

12,000 6 per cent. cumulative preference shares of £5 each	60,000
10,500 ordinary shares of £5 each	52,500
	£112,500

To be paid up as follows:

£	s.	d.	
1	0	0	per share on application.
1	0	0	„ „ allotment.

and the rest in calls as required.

(Or the whole amount may be paid on application.)

The preference shares are entitled to a preference as to capital and dividend over the ordinary shares. It is intended to pay dividends thereon half-yearly on June 15th and December 15th.

Directors:

A. Smith, of , Director of Companies.
J. G. B., of , Brewer.
R. C., of , Brewer.

Solicitors:

G. F. & Co.

Bankers:

C. & C. Bank.

Auditors:
G. H. & Co. of

Secretary and Offices:
J. King,
Fleet Street, E.C.

PROSPECTUS.

This company has been formed to acquire, as from July 6th, 1909, the whole of the business of Jones & Sons, established upwards of 100 years.

The property acquired by the new company comprises:

(a) The freehold brewery and maltings known as Blank Brewery.
(b) Ninety-nine freehold licensed houses.
(c) Ten leasehold licensed houses.
(d) Dwelling-houses, shops, cottages, stabling, and valuable land.

The brewery premises cover a large area, and are in good and substantial repair. There are two good maltings of 90 and 30 quarters capacity respectively. The plant is equal to 30 quarters. The brewery is well found in loose and moveable stocks, casks, drays, and other appliances.

The books and accounts of Jones & Sons show the profits to have been as follows:

	£	*s.*	*d.*
For the year ending October, 1906	17,402	18	11
„ „ 1907	15,668	2	0
„ „ 1908	16,714	7	0

(Or an average of £16,595 3*s.* 2*d.*)

The purchase price of the properties to be acquired, including the two properties mentioned, has been fixed by the vendors, Messrs. B. and I., of , at £211,591 5*s.* 6*d.* payable as to £100,000 by the allotment of first mortgage debenture stock of that amount, and the balance in cash. The price for the loans, stocks, book debts, casks, horses, drays, etc., has been fixed by valuation at £9504 3*s.* 5*d.* The properties acquired have been examined and reported upon for the purposes of this purchase by Mr. A. Smith, managing director of the Thames Brewery Co., Limited, and a director of this company, as

being of a value in excess of the purchase consideration, apart from any goodwill attaching to the brewery. No part of the purchase price is, therefore, paid in respect of goodwill.

The properties are sold to this company by Messrs. B. and I., of , who recently purchased them from Jones & Sons, Limited, for the sum of £202,591 5*s*. 6*d*.

The company will pay all the preliminary expenses relating to the formation of the company, the issue of this prospectus, the preparation of the contracts hereafter mentioned, the registration of the company, and the fee of Mr. A. Smith, one of the directors, for his services in negotiating the purchase and reporting upon the properties amounting to £1000.

The whole of such preliminary expenses are estimated to amount to £3000.

The following contracts have been entered into:

1. Dated August 20th, 1906, between Thomas Jones of , on behalf of Jones & Sons, Limited, of the one part, and J. G. B. and A. W. I. of the other part.

2. Dated September 16th, 1906, between the said B. and I. of the one part, and this company of the other part.

There is also a verbal contract made in or about the month of July, 1906, between the said Messrs. B. and I. and the said A. Smith for payment to him of the fee above mentioned.

Mr. J. G. B. is interested in the sale as partner in the firm of B. and I.: Mr. A. Smith is interested to the extent of the receipt of the fee above mentioned.

The articles of association provide as follows:

The qualification of every director shall be the holding in his own right of shares in the company of £500 nominal value.

The directors respectively shall be entitled to be repaid out of the funds of the company all personal expenses incurred in or about the business of the company, and in addition thereto, each of the first directors (other than the managing director) shall be paid for his remuneration out of the funds of the company at the rate of £100 per annum.

The minimum subscription of shares upon which the company will proceed to allotment is £20,000, but the whole of the present issue has been underwritten by Messrs. B. and I. in consideration of the sum of £6000, part of the sum of £211,591 5*s*. 6*d*. payable to them by the company as above mentioned.

On a show of hands each member present in person shall have

one vote, and on a poll each member present in person or by proxy shall have one vote for each ordinary share held by him, and one vote for every five preference shares held by him.

A copy of this company's memorandum of association will be found printed in the fold of this prospectus, and forms part thereof.

Copies of the above-mentioned contracts, auditor's certificate, and the memorandum and articles of association can be seen at the offices of the solicitors to the company before the closing of the list of applications.

The company will pay a brokerage of one-half per cent. on all allotments made in respect of applications bearing brokers' stamps. Application for a settlement and quotation for this issue of preference and ordinary shares will be made in due course.

If no allotment is made, the deposit will be returned in full by post, and where the amount allotted is less than that applied for the available balance will be appropriated for the payment due on allotment, and any excess returned by post to the applicant.

Prospectuses and forms of application may be obtained at the offices of the company, or from the solicitors, bankers, brokers, and auditors.

September 16*th*, 1909.

(One copy is signed by all the directors.)

MEMORANDUM OF ASSOCIATION OF BLANK COMPANY, LIMITED.

Here follows the form of Memorandum of Association similar to that set out on p. 13.

CHAPTER VII.

MEMBERS OR SHAREHOLDERS.

Section 1.

How Persons may become Members.

Persons may become members of a company in any of the following ways:

(1) Persons who sign the Memorandum are **deemed** to have agreed to be members, and **on the registration of the company** must be put on the register of members (*a*).

(2) Persons who have agreed to become members, either—

(a) by applying for an allotment of shares, or

(b) by taking a transfer from a member,

become members **when entered on the register of members.**

(3) A person who acts as director is sometimes deemed to have agreed to take his qualification shares (*Salton* v. *New Beeston Co.*, [1899] 1 Ch. 775).

As to 1.—Neither allotment nor registration is necessary to make a subscriber to the Memorandum a member of the company.

Every subscriber to the Memorandum must take the shares for which he subscribed, **and pay for them,** and

(*a*) Companies Act, s. 24.

he is only excused if **all** the shares have already been taken (*Tuffnell's Case* (1883), 29 Ch. D. 421).

If the company never becomes entitled to commence business, he can probably get his money back on the ground that the contract is void (*b*).

He must take them **from the company**:—(otherwise the first subscriber might take his one share and transfer it to the second, and so on), for **the same shares cannot be made to do double duty.**

This rule occasionally led to hardship before the Act of 1900; for a vendor who agreed to take shares as part of the purchase money, and in ignorance signed the Memorandum for those shares, found himself bound to take them twice over (*d*). But this decision depended on section 25 of the Companies' Act, 1867, which is now repealed by the Companies Act, 1900. Even now it is safer to provide expressly in the Articles that the shares to be allotted in payment of the purchase money are the same as those in respect of which the Memorandum is signed, and it is better to avoid the question by the vendor not signing the Memorandum at all, or by his signing for one share only.

As to 2.—A person who agrees to become a member (*e*), does not become a member until his name is put on the register. But he is entitled to specific performance of the company's agreement to make him a member.

Rectification of the Register.

The register is only *primâ facie* evidence; thus, if a person who has agreed to become a member is

(*b*) See *Re Otto Electrical Co.*, [1906] 2 Ch. 390.

(*d*) *Re Timmins, Ld.*, [1901] W. N. 238, and see *re Wilkinson Sword Co.*, [1913] W. N. 27, where the difficulty was surmounted by registering by leave of the court a memorandum operating as a filed contract.

(*e*) For rules as to a contract to take shares, see p. 96.

not put on the register the court may rectify the register on the winding up of the company (*Arnot's Case* (1887), 36 Ch. D. 702, at p. 707); and a person who is wrongfully removed from the register, remains a member (*Barton* v. *London and North Western Rail. Co.* (1889), 24 Q. B. D. 77): and if a person who has not agreed to take shares is put on the register, he is not a member (*Ormerod's Case*, [1894] 2 Ch. 475); and if he has been induced to take the shares by misrepresentation, the register can be rectified, if he applies to the court within a reasonable time after discovering the misrepresentation (*f*).

The applicant must prove by direct evidence that the statements were false, and he is not entitled to rely on admissions made by the chairman of directors at a meeting of shareholders (*g*) or on the report of an expert employed to report to the company (*h*).

Where there are no directors the court may appoint some person to rectify the register (*hh*).

SECTION 2.

Who may become a Member.

(1) **A company** may become a member of another company, if it is authorised by its Memorandum to take shares, or if it takes the shares in payment of a

(*f*) Such an application may be made by the company itself *Re London Electrobus Co.*, [1906] W. N. 147.

(*g*) *Devala Provident Gold Co.*, 22 Ch. D. 593. This decision was based on the theory that the chairman was an agent reporting to his principals, viz. the shareholders. This view is difficult to reconcile with *Percival* v. *Wright*, [1902] 2 Ch. 421, where it was held that the directors are not agents for the individual shareholders, and see *Djambi Rubber Estates*, note (*h*) below.

(*h*) *Djambi Rubber Estates, Ld.*, [1912] W. N. 192. If the directors in their report to the shareholders admit the truth of the expert's report, such admissions may be evidence against the company. S. C. 107 L. T. at p. 632, and see 29 T. L. R. 28.

(*hh*) *Manihot Rubber Plantations*, 63 Sol. Jo. 827.

debt by way of compromise (*i*) (*Lands Allotment Co.*, [1894] 1 Ch. 616, at p. 630).

But a company cannot acquire its own shares and become a member of itself, even if expressly authorised so to do by its Memorandum (*j*).

(2) **An infant** may take shares, subject to a right to repudiate them on attaining full age.

Hamilton v. Vaughan Sherrin Co., [1894] 3 Ch. 589.

Miss H. (aged eighteen), applied for twenty £5 shares, and paid £1 each on allotment. No dividends were paid. Six weeks later she repudiated the shares:—**Held,** she could repudiate all liability.

But the infant cannot recover any money paid for the shares unless there has been a total failure of consideration, *e.g.* if the shares were absolutely worthless. (*jj*)

(3) **A married woman** even before 1882 could hold shares as her separate estate. If she held them otherwise, her husband was liable for calls.

Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a company may (if its Articles so provide) refuse to register a married woman as a member, if there is any liability on the shares.

(4) **A person who lends money to the company on a mortgage of its shares,** may become liable as a member in respect of those shares.

Addison's Case (1870), 5 Ch. Ap. 294.

A. lent the company £500 by taking 100 £5 shares and paying for them, with an agreement that the money was to be paid back on one month's notice. A. gave the notice, and the company repaid the £500. A. transferred the shares to a **nominee of the company**:—**Held,** the company had no power to take back its own shares. A. was liable to pay £500 in respect of them.

(*i*) See Companies Act, s. 68, as to the way in which such a company can vote.

(*j*) *Trevor* v. *Whitworth* (1887), 12 A. C. 409.

(*jj*) *Steinberg* v. *Scala* (*Leeds*), *Ltd.*, [1923] 2 Ch. 452, overruling *Hamilton* v. *Vaughan Sherrin Co.* (*above*), unless that case is distinguishable on the ground that the shares were worthless.

(5) **A person who takes shares in the name of a fictitious person,** becomes liable as a member.

Re Klondyke Gold Co., W. N. (1899), 1, 2.

S. carried on business under an assumed name; he took shares in that name and became bankrupt. His trustee tried to avoid liability as a shareholder:—**Held,** S. was liable.

Persons who do not become Members.

A person who agrees to **place** shares does not thereby agree to **take** shares, and therefore does not become a member.

Gorissen's Case (1873), L. R. 8 Ch. 507.

G. agreed that he would "place" 1000 shares for the company in consideration of being appointed its agent. The company registered G. as a holder of 1000 shares:—**Held,** G. was not a shareholder: he had not agreed to **take** shares, but only to find other persons who would take them.

A trustee with power of sale cannot sell the trust property for shares.

Re Morrison, [1901] 1 Ch. 701.

A testator gave all his property to trustees on trust to sell and invest in the ordinary trustee investments. He had an iron business. The trustees wished to turn the business into a company by selling it to a company in return for shares:—**Held,** the trustees had no power to do this, and the court had no power to sanction it.

By the Law of Property Act, 1922, s. 123, the court is enabled (when that Act comes into force) to confer on trustees power to purchase shares in this way even though such a purchase is not authorised by the trust.

Even before this Act where trustees were authorised to hold shares in a particular company, and that company was wound up and its business transferred to another company as part of a reconstruction scheme, the court allowed the trustees to hold the corresponding shares in the new company (*Re New*, [1901] 2 Ch. 534).

A person may cease to be a member by—

(1) transfer (but he remains liable to be put on the "B" list for one year, see p. 89);
(2) forfeiture (see p. 115);
(3) sale by the company under its lien (see p. 120);
(4) death (the shares are transmitted to his personal representatives);
(5) winding-up of the company.

SECTION 3.

Liability of Members.

(1) Apart from express agreement.

A shareholder must pay the whole nominal amount of his share **in cash.** Otherwise he will be liable for the amount unpaid on the winding-up of the company.

"**Cash**" means "such a transaction as would, in an action at law for calls, support a plea of payment."

Thus, if the company owes A. £100, and A. then agrees to take 100 £1 shares in satisfaction of the debt, the shares are fully paid up **in cash.** It is not necessary for A. to pay a cheque for £100 to the company, and for the company to hand it back to A.

Larocque v. Beauchemin, [1897] A. C. 358.

The company agreed to buy a paper mill for $35,000 in cash. The vendors then agreed to take 50,000 shares in the company, and paid for some of them in cash, but the rest were paid for by the company retaining part of the $35,000 which they owed the vendors. (NOTE.—This was not an agreement to sell for **shares,** but to sell for **cash,** and a later independent agreement to take shares):—**Held,** the whole 50,000 shares had been paid for in cash. Lord MACNAGHTEN: "If a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money **at once** for the purchase of the property, and on the other side a *bonâ fide* liability to pay money **at once** on shares, so that, if bank notes had been handed from one side of the table to the

other in payment of calls, they might legitimately have been handed back in payment for the property, it appears to me that the Act does not make it necessary that the formality should be gone through of the money being handed over and taken back again."

The most important result of this rule is the further rule that **shares cannot be issued at a discount,** *i.e.* a company cannot issue a £100 share with an agreement that only £75 shall be paid.

Ooregum Gold Co. v. Roper, [1892] A. C. 125.

The company was in difficulties. Its £1 shares stood at 2*s.* 6*d.* The directors issued 120,000 £1 shares with 15*s.* credited paid up, so that only 5*s.* was payable on each share :—**Held,** this would have been illegal, even if the Memorandum had expressly authorised it.

Shares must not be issued at a discount even by way of compromise (*Mother Lode Gold Mines* v. *Hill* (1903), 19 T. L. R. 341), nor in any other indirect way (*k*).

Mosely v. Koffyfontein Mines, [1904] 2 Ch. 108.

The company proposed to issue debentures at a discount of 20 per cent. (*i.e.* to borrow money and to become liable to repay £100 for every £80 lent). Every holder of a debenture was to have the right to surrender every £1 worth of his debentures in return for a fully paid £1 share :—**Held,** this arrangement was not legal, as the result would be that a holder might get 100 £1 shares for £80.

This rule was not destroyed by the Companies Act, 1900, s. 8 (*l*), which, although wide in its terms, only allows payment of a commission under certain restrictions, see p. 186.

(2) **Agreements to allot shares for a consideration other than cash.**—Shares may be issued as fully paid up as consideration for the sale of a business or other

(*k*) Cf. *Bury* v. *Famatina Development Corporation,* [1909] 1 Ch. 754, 1910, A. C. 439.

(*l*) Now s. 89 of the Companies Act.

property sold to the company. The company must register with the registrar **within one month,** a contract in writing (or particulars of the contract if it is not in writing (*m*)) showing the title of the shareholder and the consideration that he gave for the shares (*n*).

By an Act of 1867 (*o*), the contract had to be registered **at once,** and if default was made, the shareholder was liable to pay for the shares in full.

Under the present Act, **if default is made,** the directors are subject to penalties, but the **liability of the shareholder is not affected.**

This is not an exception to the rule that shares must be fully paid up, but only to the rule that they must be paid **in cash.**

A person to whom shares are allotted as fully paid for a consideration other than cash may be held liable, whether or not a contract has been filed if (1) The contract is fraudulent, or (2) **the consideration is illusory,** or (3) the contract shows clearly **on the face of it** that the consideration was of a **less money value** than the shares allotted.

Hong Kong and China Gas Co. v. Glen, [1914] 1 Ch. 527.

Glen sold a concession to the company in consideration of 400 shares of £10 each and one fifth of any increase of the company's capital over £20,000:—**Held,** the 400 shares were fully paid, and the company was bound to allot to Glen one fifth of any increased capital: but such further shares would not be fully paid.

A person who has taken shares which are not properly paid up may be ordered to pay for the shares in full, though he was ignorant of the law. (*oo*)

(*m*) S. 88 (2) of the Companies Act.
(*n*) S. 88 of the Companies Act.
(*o*) 30 & 31 Vict. c. 131, s. 25.
(*oo*) *Re James Pitkin & Co.*, [1916] W. N. 112.

In any other case the court will not inquire into the adequacy of the consideration.

Re Wragg, Limited, [1897] 1 Ch. 796.

The vendors sold an omnibus business to the company for £46,000, of which £20,000 was to be paid in fully paid shares. The proper contract was filed. Evidence was given that the business was not worth anything like that amount:—**Held,** if there is fraud, the contract can be set aside; but apart from that, if a contract is filed, the court will not go into the adequacy of the consideration (*p*).

This is a decision of the Court of Appeal and has been acted on for many years; but at least one judge has thrown out suggestions that it went too far (*q*).

Shares are often allotted as fully paid in **consideration of services** performed by the promoters before the incorporation of the company.

(1) If these services have enhanced the value of any property sold to the company, the allotment is really a part of the consideration for the sale of the property and is valid.

(2) If no property sold to the company has benefited by the services, it is difficult to see what is the consideration for the allotment, for **past services are in law no consideration**, unless rendered at request; and the company could not make such a request before it was incorporated, or ratify it afterwards (see pp. 53, 54). Such a consideration is therefore probably illusory.

(3) The company cannot agree that the liability on shares shall be wiped out in consideration of a promise of **future services** (*r*); but the company can agree to

(*p*) And see *Mosely* v. *Koffyfontein Mines*, [1904] 2 Ch. at p. 116.
(*q*) Buckley, 9th ed., pp. 213, 214.
(*r*) *Pellatt's case*, L. R. 2 Ch. 527.

pay an immediate sum in cash for future services, and can then treat that sum as having been applied in payment of the liability on the shares (*s*).

A shareholder who transfers his shares remains liable to a certain extent; for on a winding-up two lists are made,

The "A" list or list of present members; and

The "B" list or list of persons who have ceased to be members within one year before the winding up.

Any person on the "B" list is liable to the extent of the amounts unpaid on his shares if—

(1) on the winding-up debts exist which were incurred while he was a member; and

(2) the members on the "A" list cannot satisfy the contributions required from them in respect of those shares.

(The position of persons on the "B" list is fully explained in *Helbert* v. *Banner* (1871), L. R. 5 H. L., at p. 34, and see p. 261, *post*.)

SECTION 4.

Register of Members.

The register contains the name and address of each member, the amount and numbers of his shares, the date of acquiring them, and the amount paid up.

It is open to members gratis, and to non-members on payment of 1*s*. (*x*) and any person may demand

(*s*) *Gardner* v. *Iredale*, [1912] 1 Ch. 700, at p. 716.
(*x*) Companies Act, s. 30.

a copy at 6*d.* per 100 words, but he may not make extracts (*Balaghat Co.*, [1901] 2 K. B. 665; overruling *Boord* v. *African Co.*, W. N. (1897) 174) (*y*).

Thus it is possible for any person who wishes to deal with the company to know who are the members and for how much each is liable. It is generally safe to rely on the register, for although it is not conclusive, it is *primâ facie* (*z*) proof that the person on the register is the person liable. Thus, if a person allows himself to be on the register without objecting, he may be held liable; but if he was induced to become a member through fraud, and did not discover the fraud until the winding-up, he will not be liable.

Baillie's Case, [1898] 1 Ch. 110.

B. wished to join an old society called the "Auctioneers Institute of the United Kingdom." A new society, "The Institute of Auctioneers and Valuers," persuaded him to join, pretending to be the old society :—**Held**, B. may be struck off the register.

"No notice of any trust shall be entered on the register" (*a*).—This means that the company need not take any notice of a trust even if it has constructive notice that there is a trust.

Simpson v. Molsons' Bank, [1895] A C. 270.

Trustees held shares in the bank under a will upon trust for S. The trustees transferred some of the shares to a person who was not entitled to them. A copy of the will was deposited in the bank, and the president of the bank was one of the executors of the will: but in spite of this the bank registered the transfer :—**Held,** the bank was not liable to S. (*b*).

But if the company deals with the shares itself (*e.g.*

(*y*) The motives of the person requiring the copy appear to be immaterial: *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 248.
(*z*) See p. 81.
(*a*) Companies Act, s. 27.
(*b*) And see *Rearden* v. *Provincial Bank*, 1896, 1 I. R. 532.

lends money on security of the shares) it will be bound by constructive notice in the same way as any other person dealing with the shares (*Longman* v. *Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646; *Mackereth* v. *Wigan Coal Co.*, [1916] 2 Ch. 293).

It does not mean that there cannot be a trust of shares. If there is, the trustee's name is put on the register, and he is the shareholder, and is liable for calls, even though the calls exceed the value of the trust property in his hands.

The Trustee, however, is entitled to be indemnified by the beneficiary. Thus, though the company looks only to the person on the register, it is the beneficiary who is **ultimately** liable for the calls; and possibly the company could sue the beneficiary direct (standing in the shoes of the trustee as to his indemnity).

The beneficiary (if he is *sui juris*) must indemnify the trustee for all calls paid even if they exceed the amount of the trust property.

Hardoon v. Belilios, [1901] A. C. 118.

A stockbroker took 500 shares in the name of his clerk. The broker received the dividends. The company called upon the clerk to pay £400 in calls. The clerk claimed that he was entitled to be indemnified by the broker; but the broker claimed that the indemnity must be limited to the value of the trust property (viz., the shares, which were valueless):—**Held,** the broker must indemnify the clerk by paying the whole £400 (*c*).

An **executor** of a shareholder is not personally liable to pay calls, unless he applies to be put on the register

(*c*) But this does not apply to the trustees of a club where the understanding is that the members are not to be called upon to pay more than their subscriptions (*Wise* v. *Perpetual Trustees Co.*, [1903] A. C. 139).

and is entered on the register as the holder of the shares.

If he does, he is entitled to an indemnity from the estate.

If he does not, the estate is liable to the company for calls.

Thus the estate is ultimately liable in either case.

An executor is entitled to be put on the register on proof of his title, and the company is not entitled to qualify the entry of his name on the register, by showing that he holds the shares in a representative capacity (*d*).

Another result of the rule that trusts shall not be put on the register is that where there are several mortgages of the same shares, the mortgagee first in date has priority, not the first who gives notice to the company (*e*).

Joint holders.—The articles usually provide that where there are joint holders of shares the member whose name appears first on the register may vote. Joint holders are entitled to be entered on the register in any order they like. (*ee*).

SECTION 5.

Annual List of Members.

A company must make a list of its members and every year send it to the Registrar (*f*).

This list must contain the names, addresses, and occupations of all the members and the number of

(*d*) *Re T. H. Saunders & Co., Ld.*, [1908] 1 Ch. 415.
(*e*) See *Société Generale* v. *Walker* (1885), 11 App. Cas. 20.
(*ee*) *Burns* v. *Siemens Bros.*, [1919] 1 Ch. 225.
(*f*) Companies Act, s. 26.—The list must be made within 14 days after the first ordinary general meeting of the company and sent to the Registrar within seven days. It must be signed by the manager or secretary.

shares held by them, distinguishing between the shares issued for cash and those issued otherwise than for cash.

The list must also contain a summary called the "**Annual Summary.**"

This summary must specify and contain (*g*)—

(1) The names and addresses of the present members and of past members who were members at the date of the last return.

(2) The amount of capital and the shares into which it is divided.

(3) The number of shares taken since the commencement of the company.

(4) The amount of calls made on each share.

(5) The total amount of calls received and calls unpaid and of shares forfeited.

(6) The amount paid for underwriting shares and debentures since the last return.

(7) The number of share warrants and the number of shares comprised in them.

(8) A list of the directors.

(9) The total amount of the debts secured by mort gages and charges.

(10) A balance sheet showing capital, liabilities, and assets.

This balance sheet must show with a reasonable amount of detail the general nature of the assets and liabilities of the company and how the value of the assets has been arrived at (*h*).

(11) Particulars as to the names and nationality and former names in case of a change of name are now required by the Companies (particulars as to Directors) Act, 1917.

(*g*) For the full list, see s. 26, in the Appendix.
(*h*) *Galloway* v. *Schill & Co., Ld.*, [1912] 2 K. B. 354.

CHAPTER VIII.

SHARES.

A SHARE is a right to receive a certain proportion of the profits of the company and of the capital of the company when it is wound up. The shares in a company are all numbered and the shares of each member are identified by these numbers.

SECTION 1.

Allotment.

Allotment is the appropriation to a person of a certain number of shares. This is usually done by a resolution of the Board of Directors.

An **application** for shares is an **offer** to take shares; **allotment** is the acceptance of that offer by the company.

The following is a form of application for shares:

No. .

Form of Application for Ordinary Shares.

BLANK COMPANY, LIMITED.

(*Incorporated under the Companies (Consolidation) Act*, 1908.)

Issue of 10,500 Ordinary Shares of £5 each.

To the above-named Company,

Gentlemen,

Having paid to your bankers the sum of £ , being a deposit of £1 per share on of the above-mentioned ordinary shares, I (we) **request** you to allot to me (us) that number of ordinary shares **upon the terms of your prospectus,** dated

September 1st, 1909, and I (we) hereby agree to accept the same or any smaller number that may be allotted to me (us) and to pay the balance, if any, due on allotment as provided by the said prospectus, and I (we) **authorise you to place my (our) name on the register of members** in respect of the shares so to be allotted to me (us).

To be written distinctly.

Name in full (Rev., Mr., Mrs., or Miss) .
Address in full .
Occupation .
Date , 19 .
Usual signature .

The allotment of shares is governed by the Companies Act, and subject to the provisions of the Act, by the common-law rules of contract.

By s. 85 of the Companies Act, 1908, no shares are to be allotted until the "minimum subscription" (*a*) has been subscribed and the amount due on application (which must not be less than five per cent. of the nominal amount of the shares) has been paid.

If the minimum subscription is not subscribed (*b*) within forty days after the issue of the prospectus, the money paid by subscribers must be returned within the next eight days. If not, the directors become liable to repay the money with interest at five per cent. from the end of the forty-eight days.

The effect of allotting shares before the minimum subscription has been subscribed is—

(1) the allotment may be set aside within one month of the statutory meeting; and

(2) any director who has knowledge of the fact is

(*a*) See p. 69.

(*b*) The application moneys are not considered to be duly paid until the cheques have been duly cleared (*National Motor Mail Co.*, [1908] 2 Ch. 228; *Mears* v. *West Canada Pulp Co.*, [1905] 2 Ch. 353, 360).

liable to compensate the company or the members (*c*).

This section (except the provision as to the amount payable on application) does not apply to any allotment of shares after the first allotment of shares offered to the public.

A person to whom shares are allotted cannot safely deal with them until this section has been complied with, and the company has become entitled to commence business under s. 87 (see p. 70).

Finance and Issue, Limited v. Canadian Produce Co., Limited, [1905] 1 Ch. 37.

The company by mistake allotted 40,000 shares before the minimum subscription had been subscribed :—**Held,** the allottees have a right to rescind their allotments, but the company may give to every allottee an option to have the allotment cancelled and the money returned.

Subject to these provisions of the Companies Act the same rules apply to a contract to take shares as to any other contract. The application is the offer : the allotment is the acceptance.

There is no binding contract until the allotment has been made (by resolution of the Board), **and notice of allotment has been posted** or has reached the allottee in some other way.

Dunlop v. Higgins (1848), 1 H. L. C. 381.

The allotment letter was delayed in the post. The allottee repudiated :—**Held,** the contract was complete when the allotment letter was posted.

Household Insurance Co. v. Grant (1878), 4 Ex. D. 216.

The same result where the letter was **lost** in the post.

(*c*) Companies Act, s. 86; and see *Burton* v. *Bevan*, [1908] 2 Ch. 240, where a director who was not present at the meeting at which the Board determined to go to allotment, was held not to be liable.

But if the company is bound to allot a certain number of shares to a certain person, the contract is complete as soon as the application is posted.

Thus, suppose on an issue of further capital each holder of three old shares is entitled to two of the new shares (*i.e.*, two shares are offered to him on certain terms), the holder accepts the offer if he applies for the shares.

Notice of allotment is not necessary if the applicant states that he does not require notice.

If there is undue delay in the allotment, the offer lapses;

Ramsgate Hotel Co. v. Montefiore (1866), L. R. 1 Ex. 109.

M. applied for shares June 28th. Shares allotted November 23rd. M. refused to take them:—**Held**, the offer had lapsed before acceptance.

Conditional applications may be made;

Rogers' Case (1868), 3 Ch. App. 633.

R. wanted to be appointed local manager of a company. He was told he would have to take 100 shares. He applied for the shares, but was not appointed. He refused to take them:—**Held**, the application was conditional on his being appointed local manager, and he might refuse.

There is no contract if the applicant thinks he is applying to a different company: at any rate, if he is induced to do so by fraud (*Baillie's Case*, [1898] 1 Ch. 110: see p. 90).

Shares in a company are personal property even though the company owns land (*d*). There are, however, some exceptions, *e.g.* the New River Company, a share in which is real property (*e*).

(*d*) *Entwhistle* v. *Davis* (1867), L. R. 4 Eq. 272.

(*e*) And may (subject to the Law of Property Act, 1922) be held by several persons as tenants in common (*Swayne* v. *Fawkener*, Showers, P. C. 298 (263)).

SECTION 2.

Certificates.

A member of a company has a right to a certificate of his shares, which must be prepared and ready for delivery within two months after the shares have been allotted or a transfer registered (*f*).

The certificate is usually in the following form :

No. .

Share Certificate.

BLANK, LIMITED.

THIS IS TO CERTIFY that Thomas Smith of (address) is the registered proprietor of one hundred ordinary shares of ten pounds each, numbered 2551 to 2650 both inclusive, in the above-named company, subject to the Memorandum and Articles thereof, and that up to this date there has been paid in respect of each such share the sum of five pounds.

Given under the common seal of the said company the 11th day of March, 1909.

JOHN JONES,
WILLIAM BROWN, } Directors.

SAMUEL GREEN, Secretary.

The object of a certificate is to enable a shareholder on dealing with his shares to show at once a good *primâ facie* title.

It is therefore very difficult for a shareholder to deal with his shares without producing the certificate. Consequently, money is often lent to the shareholder, the lender taking possession of the certificate by way of security.

Loss of the certificate.—The articles usually provide that if a certificate is lost or destroyed the company will grant a new one, on satisfactory proof of the loss or destruction.

(*f*) Companies Act, s. 92.

The effect of a certificate.—"A certificate . . . is a statement that the company asserts that the person to whom it is granted is the registered shareholder entitled to the shares included in the certificate, and . . . that the amount certified to be paid has been paid" (Buckley, 10th ed., p. 44).

The company may be liable in two ways:

1. Estoppel as to title.

If the company authorises the issue of a certificate stating that A. is the registered holder of certain shares, it cannot afterwards allege that A. is not entitled to those shares.

Dixon v. Kennaway, [1900] 1 Ch. 833.

Liddell was the secretary of a company and a stockbroker. Mrs. D. applied to L. for 300 shares in the company, and paid for them. Pitman (clerk to L.), who owned no shares, executed a transfer of 300 shares to Mrs. D.

The company, without requiring P.'s certificate to be produced, registered the transfer and gave Mrs. D. a new certificate:—**Held, the company is estopped from denying the validity of Mrs. D.'s certificate** and is liable to her in damages.

But if an officer of the company issues certificates **without the authority of the company,** there is no estoppel.

Ruben v. Great Fingall Consolidated, [1906] A. C. 439.

R. lent money to the secretary of the company on the security of a share certificate. The secretary signed his own name on the certificate, affixed the seal of the company, and forged the names of two directors:—**Held,** the certificate was simply a forgery, and the company was not bound by it.

A company may however be liable in damages for the fraud of its officer (*g*).

2. Estoppel as to payment.

If the certificate states that the shares are fully

(*g*) *Lloyd* v. *Grace Smith & Co.*, 1912, A. C. 716.

paid, the company cannot afterwards allege that they are not fully paid.

Bloomenthal v. Ford, [1897] A. C. 156.

B., the stationer of the company, agreed to lend £1,000 to the company on the security of 10,000 fully paid shares. The company issued 10,000 shares to him with a certificate on which they were described as fully paid. In fact, nothing had been paid. The company was wound up, and B. was put on the list of contributories:—**Held,** the company and its liquidator were estopped from denying that the shares were fully paid, and B. could be removed from the list.

Such a statement in the certificate would not help a person who knew that the shares were not paid for in full in cash (*h*).

The fact that the shareholder's partner is also a director of the company does not amount to constructive notice that the shares are not fully paid (*i*).

The certificate does not certify anything as to the equitable interest in the shares.

If a person who is not the registered holder of the shares obtains any rights over the share certificate (*e.g.* by a mortgage of or agreement to transfer the shares), it seems that the company is not under any duty to that person.

Rainford v. James Keith, Limited, [1905] 1 Ch. 296.

C., the registered holder of 120 shares, mortgaged them to R. by deposit of his certificate. Later, C. sold the same shares to Y., telling the company that a friend of his held the certificate, but not by way of security. The company registered Y. as the holder, and gave him a certificate:—**Held,** the company was negligent in accepting such an excuse from C. But **held,** the company was not liable for such negligence as it owed no duty to R. (although the certificate stated that no transfer would be registered without the production of the certificate).

(*h*) *African Gold Co.*, [1899] 1 Ch. 414.
(*i*) *Coasters, Ld.*, 1911, 1 Ch. 86.

NOTE.—There was no question of estoppel by certificate in this case, for the certificate simply stated that C. was the registered holder, which was true (*k*).

SECTION 3.

Transfer.

A shareholder has power to transfer his shares by s. 22 of the Companies Act.

The form of transfer is generally governed by the Articles. See Arts. 30 and 31 on p. 34.

If there are no provisions in the Articles, the transfer must be in writing, signed by the transferor, as it is a transfer of a chose in action (*l*). But it need not be by deed.

A transfer is usually in the following form :

(Stamp, £1.)

I, Thomas Smith (the transferor), of , in consideration of the sum of one hundred pounds paid by John Jones, of , hereinafter called the said transferee,

Do hereby bargain, sell, assign and transfer to the said transferee :

250 shares of £1 each, 15 shillings paid, numbered 404,201 to 404,450, both inclusive, of and in the undertaking called Blank, Limited.

To hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said transferee, do hereby agree to accept and take the said shares, subject to the conditions aforesaid.

As witness our hands and seals, this twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

Certificate for 250 £1 shares forwarded to the Company's Office by Thomas Smith.

Signed [*Secretary.*]

(*k*) This case was overruled on the facts. S. C., [1905] 2 Ch. 147; but the decision of the point of law was not upset; and see *Longman* v. *Bath Electric Trams*, 1905, 1 Ch. 646.

(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6).

Signed, sealed, and delivered, by the above-named Thomas Smith, in the presence of—
Witness's—
Signature, A. BAKER.
Address .
Occupation .

THOMAS SMITH (*Seal*).

Signed, sealed, and delivered, by the above-mentioned John Jones in the presence of—
Witness's—
Signature, B. GREEN.
Address .
Occupation .

J. JONES (*Seal*).

The transfer is executed by the transferor, and handed to the transferee with the share certificate. The transferee executes it, and sends it to the company for registration. Until registration the transfer is not complete, but the transferee has a mere equitable interest. The company must register the transfer as soon as possible, having regard to any inquiries that may be necessary. If the officers of the company delay the registration unduly, the transferee may be given all the rights which he would have had if they had registered it within a proper time.

Sussex Brick Co., [1904] 1 Ch. 598.

Transferees of shares sent the transfer to the secretary. He replied that they would be submitted to the directors at the next board meeting. The company was wound up before the next meeting.

The liquidator refused to recognise the transferees as shareholders:—**Held,** the transferees must be registered "*nunc pro tunc*," *i.e.*, as if they had been registered when the registration ought to have been made.

Stamps.—A transfer for a nominal consideration was formerly stamped 10*s.*, but now by sect. 74 of the Finance (1909–10) Act, 1910, transfers operating as voluntary dispositions *inter vivos* become chargeable as if they were transfers on sale. (*m*)

If the transfer is for value it must be stamped *ad valorem* at the same rate as the conveyance of land under the Stamp Act, 1891, as altered by sect. 73 of the Finance (1909–10) Act, 1910 (*i.e.*, at the rate of 10*s.* for every £50 or part of £50, except that special rates are fixed for amounts below £300) (*mm*).

Every shareholder has a right to transfer his shares, and the transfer will be good even if made to a man of straw, when the company is in difficulties, for the purpose of avoiding liability; provided that it is an absolute out-and-out transfer without any trust or reservation for the transferor (*De Pass' Case* (1859), 4 De G. & J. 544; *Discoverers Finance Corporation, Ltd., Lindlar's Case,* [1910] 1 Ch. 207 and 312).

But this right may be restricted by the regulations (*n*). A power is usually given to directors to refuse a transfer if calls are in arrear; and a discretionary power may be given them even to refuse any transfer without assigning reasons (*o*). See Art. 32 on p. 34.

The court will not interfere with their discretion unless it can be shown that they did not act *bonâ fide.*

Re Coalport China Co., [1895] 2 Ch. 404.

By Article 3 of the company, "The directors may refuse to register any transfer . . . where they are of opinion that the proposed transferee is not a desirable person to admit to member-

(*m*) Except on an appointment of new trustees, or where no beneficial interest passes by the transfer (see s. 74 (6)).

(*mm*) Finance Act, 1920, s. 36.

(*n*) *Attorney-General* v. *Jameson,* 1904, 2 I. R. 644.

(*o*) This is not allowed by the Rules of the Stock Exchange, and should not be inserted if a quotation on the Stock Exchange is desired.

ship." The directors refused to register a certain transfer, and gave no reasons:—**Held,** in the absence of evidence that the directors had not acted *bonâ fide*, their refusal could not be questioned.

Sometimes the Articles provide that the other shareholders shall be given the right of first refusal of the shares before they can be transferred to outsiders. Similarly an agreement, that on the bankruptcy of any member his shares shall be sold to certain persons at a certain price is good (*Borland* v. *Steel Bros.*, [1901] 1 Ch. 279. See p. 47).

The company cannot object to transmission on death or (subject to the last paragraph) on bankruptcy, even if calls remain unpaid.

Specific performance of a contract to transfer shares may be decreed, unless the directors (acting within their powers) refuse to register the transfer; then an action for damages will lie against the transferor.

Mortgage of Shares.—Shares are usually mortgaged by **depositing the share certificate** with the lender. Sometimes the borrower also executes a **blank transfer**: he fills up the transfer form but leaves the name of the transferee blank, and deposits the certificate and the transfer with the mortgagee. If the money is not paid within a reasonable time, the mortgagee may put in his own name as transferee and get the transfer registered, and thus secure a transfer of the shares, or he may sell the shares after giving reasonable notice (*p*).

Deverges v. Sandeman, [1902] 1 Ch. 579.

D. bought shares through his broker, but did not pay the purchase price (carried over). He gave a blank transfer to his

(*p*) Cf. *Stubbs* v. *Slater*, [1910] 1 Ch. at p. 639. As to the authority of a broker to deposit share certificates of a client with his bankers, see *Fuller* v. *Glyn & Co.*, 1913, W. N. 362, and as to the authority of an agent who holds a blank transfer, see *Fry* v. *Smellie*, [1912], 3 K. B. 282.

broker as security. The broker asked for payment in July, 1897, and after a long correspondence, the broker sold the shares in November, 1898:—**Held**, the sale was good.

If the transferor prevents the purchaser from being registered as a shareholder, he is liable to pay damages if the shares afterwards fall in value (*Hooper* v. *Herts*, [1906] 1 Ch. 549).

If by the articles of the company a transfer of shares must be under seal, a blank transfer cannot be filled up without a power of attorney (*Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555). But the mortgagee may enforce the arrangement as an agreement to give him a legal transfer.

This form of mortgage of shares is not at all a good security: for, if the transferor fraudulently tells the company that he has lost his certificate, he can get a new one and transfer the same shares to a purchaser. It is no use to give an ordinary notice of the mortgage to the company, as the company is not bound to take notice of any trusts or equities affecting the shares.

The only safe course is to give the company notice supported by affidavit under order 46, r. 4 (*r*).

This is called "notice in lieu of *distringas*" because it takes the place of the old writ of *distringas*. The mortgagee simply files an affidavit and a form of notice at the central office: he then serves an office copy of the affidavit and a duplicate of the notice on the company. The effect is that if the mortgagor attempts to transfer the shares, the company must give the mortagee notice that it will register the transfer unless he takes proceedings within eight days to prevent it.

Priorities as between several transferees.—If none of the transfers are registered, the first in point of time has priority (*Peat* v. *Clayton*, [1906] 1 Ch. 659).

(*r*) Rules of the Supreme Court.

But if a transferee, who is later in date, is the first to have himself registered as a member, he gets priority.

And this priority is not lost merely because there is some detail which remains to be done by the company before he is put on the register (*Moore* v. *North Western Bank*, [1891] 2 Ch. 599).

This detail must be something that the company is bound to do.

Ireland v. Hart, [1902] 1 Ch. 522.

I. held shares as trustee for his wife. Later he deposited with H. a blank transfer and the certificate, as security for his own debt. (Thus I.'s wife had the earlier equity.) H. filled up the transfer form and took it to the company for registration, but I. told the company not to register the transfer, and the company refused to do so :—**Held**, the wife was first in time, and therefore had priority, for the company were not bound to transfer to H. if they had any good reason for refusing.

Certification of transfers.—If a shareholder transfers part only of his shares, a new certificate will be required. Thus A. has one hundred shares and wishes to sell fifty to B. A. hands his certificate and transfer to the company. The company stamps on the transfer (before it is handed to B.) "certificate for 100 shares has been lodged at the company's office (signed) , secretary" (see form on p. 101). The company is said to "certify the transfer." The company then prepares two new certificates for fifty shares each and gives one to A. and one to B.

A delivery of a "certificated transfer" in this way is accepted by the Stock Exchange as a good delivery of the shares. The company does not, however, thereby guarantee A.'s right to the certificate, but merely intimates that documents apparently in order, or a

document purporting to be a certificate, have been handed in, and that A.'s name appears on the register (*Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512).

George Whitechurch, Limited v. Cavanagh, [1902] A. C. 117.

Transfers of shares were lodged with the secretary of the company without the certificates. The secretary fraudulently certified that the certificates were in the company's office:—**Held,** the company was not liable. A company does not do more than authorise the secretary to give receipts for certificates which have actually been lodged.

The company usually retains the original certificate, and when the transfer is complete, the original certificate is cancelled and new certificates are issued by the company. If the company negligently parts with the original certificate and enables the transferor to commit a fraud, then

(1) it may be liable to the transferee if he is damaged thereby; but

(2) it is not liable to any one else.

Longman v. Bath Electric Tramways, Limited, [1905] 1 Ch. 646.

B. transferred 1500 shares to H. and M. The company certified the transfer, and by mistake sent the original certificates to B. B. borrowed money from L. on the security of these certificates:—**Held,** the company was not liable to L.

If a transfer is forged, and the company registers the transfer and gives a certificate to the transferee, the true owner remains entitled to be put back on the register. The company does not incur any liability in damages by putting the transferee's name on the register, but if it issues a certificate, and any person

acts on the faith of it and suffers damage, the company will be liable (*Bloomenthal's Case,* [1897] A. C. 156).

When the company receives a transfer for registration, it usually writes to the transferor telling him of the proposed transfer, and saying that the transfer will be registered unless he objects. This gives the holder of shares an opportunity of preventing fraudulent or forged transfers from taking effect. The holder is not bound to reply to the letter, and if he does not, he will not be thereby estopped from denying the validity of the transfer (*Barton* v. *London and North Western Rail. Co.* (1889), 24 Q. B. D. 77).

If a shareholder transfers his shares, and the transfer turns out to be invalid, he remains liable for calls on the shares. See *Addison's Case* (1870), 5 Ch. App. 294, on p. 83, *ante.*

If the transfer is valid, the transferee becomes liable, on an implied contract, to pay subsequent calls, and to indemnify the transferor against any liability in respect of them, subsequent to the date of the transfer (*Levi* v. *Ayres* (1878), 3 App. Cas. 852).

Trifling irregularities in the execution of a transfer do not make it void.

Thus a transfer may be good, though the shares are wrongly numbered (*s*); and if the transferee is registered as the holder of the shares the transfer will be effective though it is not signed by the transferee (*t*).

Transfers made during the winding up of the company are void, unless sanctioned by the court or the liquidator (*x*).

(*s*) Buckley, p. 581.
(*t*) *Re Taurine Co.* (1883), 25 Ch. D. 118.
(*x*) See p. 251, *post.*

SECTION 4.

Transmission.

On the death of a shareholder his shares vest in his personal representatives (*y*), and **his estate remains liable for calls.** His representatives can sell the shares without being registered, but subject to the provisions of the articles they are entitled to be put on the register if they wish.

If the representatives are thus put on the register, or if they buy new shares on behalf of the deceased's estate, **they become personally liable for calls,** but are entitled to be indemnified by the beneficiaries.

In order that the company may get the benefit of this liability, the articles frequently contain clauses intended to induce or compel the representatives of a deceased shareholder to be registered within a certain time. See Article 39, p. 35 (*yy*).

A notice served at the registered address of a dead shareholder is valid, if the company has no notice of his death (*z*). If the company has notice of his death, the notice should be served on his representatives. It will, however, be valid even if the company has notice of the death, at any rate if the notice comes to the knowledge of the executors (*a*).

On the bankruptcy of a shareholder his trustees in bankruptcy can sell and transfer his shares, or may repudiate them if there is a liability.

If the shares are repudiated, the company can prove in the

(*y*) Shares in a limited company have always been personal property, even though the company holds land. See p. 97.

(*yy*) The power of forfeiture conferred by this article is too stringent and is probably void. See p. 117, *post.*

(*z*) *New Zealand Gold Co.* v. *Peacock*, [1894] 1 Q. B. 622.

(*a*) *James* v. *Buena Ventura Syndicate, Ld.*, [1896] 1 Ch. 456 at p. 467. *Allen* v. *Gold Reefs*, [1899] 2 Ch. 40 (C. A.), [1900] 1 Ch. 656, at p. 670.

bankruptcy of the shareholder for the amount remaining unpaid on the shares. If this is done and the company receives a dividend in the bankruptcy, it cannot afterwards sue the bankrupt for calls; but the shares are not fully-paid shares, and are not entitled to rank as fully-paid shares in the winding up of the company (see *Re West Coast Gold Fields, Ltd.*, [1906] 1 Ch. 1).

On Marriage.—Before 1883 on the marriage of a woman entitled to shares, the shares became vested in her husband: now they remain her separate property (*b*).

On the appointment of new trustees the shares must be transferred to the new trustees by an ordinary transfer. They cannot be vested in the new trustees by a vesting declaration (*c*).

SECTION 5.

Share Warrants.

When shares are **fully paid** the company may (if authorised by its regulations) issue **share warrants** under seal, stating that the bearer of the warrant is entitled to the shares therein specified. The shares then become transferable by delivery of the share warrant (*d*).

Such share warrants are negotiable instruments (*Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658, see p. 166).

Note that this can only be done when the shares are fully paid. No stamp duty is payable on a transfer, but a heavy stamp duty must be paid when the warrants are first issued (*e*).

(*b*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.
(*c*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12 (3).
(*d*) Companies Act, s. 27.
(*e*) Three times the *ad valorem* stamp duty on a transfer at the nominal value: Stamp Act, 1891 (54 & 55 Vict. c. 39), sched. i. Finance Act, 1920, s. 38.

A share warrant is usually in the following form:

THE COMPANY, LIMITED.

SHARE WARRANT.

This is to certify that the bearer of this warrant is entitled to fully paid shares of £ each in the above-named company, subject to the regulations of the company and to the conditions indorsed hereon.

The conditions indorsed on the share warrant contain the following among other provisions:

1. Warrants shall only be issued on the request of the shareholder.
2. The certificate must be surrendered to the company.
3. Coupons for dividends shall be attached.
4. Dividends may be paid to the bearer of the coupons.

When a share warrant is issued in respect of any shares, the name of the shareholder is struck off the register, because the shareholder thenceforth is the person (whoever he may be) who holds the share warrant, and the history of the shares no longer appears on the register, as the company does not know who the shareholder is, or who is entitled to the dividends. For this reason, "coupons" are attached to each share warrant, dated with the dates on which dividends will become payable during several years following the issue of the share warrant, and the dividend will be paid on each such date to the person who produces the appropriate coupon.

The holder of a share warrant is not strictly a member of the company under s. 24 of the Companies Act (see p. 80), because, though he may have agreed to become a member, his name is not entered on the register. But where there are share warrants, the

articles usually provide that the holder of a share warrant shall be a member of the company and shall have all the powers of voting, etc., as if he were on the register, and that he must produce his share warrant to the company before he can attend any meeting or vote.

SECTION 6.

Calls.

Shares are frequently issued in the following way: (say) £100,000 is offered to the public in 1000 shares of £100 each, payable as to £10 on application, £20 on allotment, another £20 in three months' time, and the remaining £50 **when called for.**

The first two and probably the third of these payments (viz., the £10, £20 and £20), are not "**calls**" (*f*).

If the company wishes to call in the whole or part of the remaining £50, the directors make a "**call.**"

Each shareholder is under a statutory liability, in the nature of a specialty debt (*g*), to pay the remaining £50 when thus called upon. The call is made in the manner specified in the Articles, usually by the directors, who pass a resolution at a board meeting and direct the secretary to give all shareholders notice of the call.

If the call is made otherwise than in the manner specified in the Articles, the call is invalid.

Re Cawley & Co. (1889), 42 Ch. D. 209.

A resolution of the directors was passed, fixing the amount of a call, but it omitted to fix the date of payment :—**Held,** there

(*f*) *Croskey* v. *Bank of Wales* (1863), 4 Giff. 314.

(*g*) Companies Act, s. 14. This section seems to imply that the period for the Statute of Limitations is 20 years. 3 & 4 Will. IV. c. 42, s. 8.

was no valid call until a subsequent resolution was passed, fixing the date of the call.

If a call is invalid, the shareholder is not bound to pay, and he may obtain an injunction (*h*) restraining the directors from forfeiting his shares, but he cannot restrain them from taking proceedings for the recovery of the call. His remedy in this case is to defend the action.

A call cannot be made on some of the members only, unless the articles expressly give this power (*Galloway* v. *Hallé Concerts*, [1915] 2 Ch. 233).

Mere trifling irregularities will not make a call invalid, and the Articles may provide that a call shall be good in spite of any irregularity.

Dawson v. African Consolidated Co., [1898] 1 Ch. 6.

The Articles of the company contained a clause the same as clause 99 on p. 42, *ante*. Three of the directors made a call. One of them happened to be disqualified by having parted with his qualification shares for a few days :—**Held**, the call was good.

The Articles may also provide that if a call is not paid when due, interest will be charged at a certain rate.

The power to make a call is in the nature of a trust to be exercised by the directors for the benefit of the company. If, therefore, a call is made, not for the benefit of the company, but for the advantage of the directors, the call may be prevented by an injunction, or the directors may be compelled to hand over for the benefit of the company the advantage gained by them.

The following is an example of a call properly made.

New Zealand, etc., Co. v. Peacock, [1894] 1 Q. B. 622.

The A. company, in accordance with powers in its Memorandum, sold its undertaking to the B. company for shares in the B. company. Some of the capital of the A. company had not been called up, and the A. company called up this capital for the

(*h*) It is frequently made a condition of relief that the money should be paid into court. *Lamb* v. *Sambas Co.*, [1908] 1 Ch. 845.

purpose of paying it over to the B. company. Some of the shareholders objected :—**Held**, the call was good.

In the following case the method of making the call was held to have been improper :— .

Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56.

The directors paid up nothing on their own shares, but made all the other shareholders pay 3*s.* 6*d.* on each share, partly on allotment, and partly by a call. The directors did not tell the other shareholders of this difference :—**Held**, this was a breach of trust, and the directors must pay to the company 3*s.* 6*d.* on each of their shares.

The directors may (if authorised by the regulations) allow shareholders to pay up the amount due on their shares before any call has been made, and may pay interest on the amount so paid "**in advance of calls.**"

But directors must only exercise this power if it is for the benefit of the company

Sykes' Case (1872), 13 Eq. 255.

The company had no money wherewith to pay the directors' fees. The directors therefore paid into the company's bank the amounts remaining due on their shares, and on the same day paid the amount to themselves in payment of their fees :—**Held**, this payment was not for the benefit of the company, and the directors remained liable to pay the amount as still due on their shares.

A shareholder who has paid up money in advance of calls, becomes a creditor of the company for the amount due to him as interest (*i*) ; therefore, if there are no profits, the interest must be paid out of capital (*Lock* v. *Queensland Investment Co.*, [1896] A. C. 461).

Calls cannot be made until the minimum subscription (*k*) has been subscribed (Companies Act, s. 87).

Calls must be paid in cash : otherwise the shareholder will remain liable on the winding-up of the company.

(*i*) But it does not follow that the Company is entitled to repay the amount so advanced—*re London and Northern S.S. Co.*, [1914] W. N. 200. (*k*) See p. 70.

If, however, cash to the amount of the call is actually due from the company to the shareholder for his services, the call may (before winding up) be set off against this amount, for the transaction amounts to a payment in cash (*l*).

On a transfer of shares, the transferee is under an implied contract to indemnify the transferor against subsequent calls (*m*). If, however, the call was made before the transfer, but payable after the transfer, the transferor apparently remains liable to pay the call; for a transferor "transfers his rights to future payments and his liability to future calls" (*National Bank of Wales*, [1897] 1 Ch. at p. 306).

The date when a call is "made," depends on the Articles of the company. If these are silent, the date of the resolution of the directors is usually the date of the call; but it depends on the practice of the company (*n*).

If a call is not paid within twenty years after it is made, the claim of the company is barred under the Statute of Limitations.

After winding up, debts due from the company cannot be set off against calls. See p. 263.

If a shareholder wishes to resist a call on the ground of misrepresentation, he must apply at once (by counterclaim or separate action) for rectification of the register (*o*).

SECTION 7.

Forfeiture.

The directors have no power to declare the shares of any member to be forfeited unless such power is given them by the Articles. See Article 21, on p. 32.

(*l*) Cf. *Larocque* v. *Beauchemin*, [1897] A. C 358, the facts of which case are summarised on p. 85, *ante*.
(*m*) See p. 108.
(*n*) *Addams* v. *Ferick* (1859), 26 Beav. 384, at p. 393.
(*o*) *First National Co.* v. *Greenfield*, [1921] 2 K. B. 260.

The Articles usually provide that, if a shareholder does not pay calls, his shares may be declared forfeited. The shares then become the property of the company, and may be sold for any price they will fetch. To this extent, **forfeited shares may be re-issued at a discount.** But the shares so sold remain unpaid to the extent that they were unpaid at the time of the forfeiture.

Morrison v. The Trustees Corporation, W. N. (1898), 154; 68 L. J. Ch. 11.

Several £10 shares with £3 paid were forfeited. The capital was afterwards reduced by converting these shares into £5 5*s*. shares with £2 5*s*. paid. The directors then sold the forfeited shares for £1 10*s*. each :—**Held,** this sale was good; but it was suggested that the shares could not have been sold as being more than £2 5*s*. paid up (*oo*).

A purchaser of forfeited shares cannot, as a rule, vote until all arrears of calls are paid (*Randt Gold Co.* v. *Wainwright,* [1901] 1 Ch. 184).

Though the forfeiture and cancellation of shares really amounts to a reduction of capital, it can be done without leave of the court, as the cancellation of forfeited shares is authorised by Clause 27 of Table A.

The power to declare shares forfeited is in the nature of a trust to be exercised for the benefit of the company. Thus, if shares are declared forfeited for the purpose of relieving a friend from liability, the forfeiture may be set aside.

Re Esparto Trading Co. (1879), 12 Ch. D. 191.

H. and G. were given certain shares to qualify them as directors. They paid nothing on the shares. Later, the company was not doing well, and H. and G. asked the company to cancel their shares. This was done :—**Held,** H. and G. were liable to pay the whole nominal amount of their shares.

(*oo*) See also *New Balkis* v. *Rand Gold Mines,* [1904] A. C. 165.

Shares cannot be forfeited except for non-payment of calls or for some other similar reason contemplated by clause 26 of Table A as a cause of forfeiture. An attempt to forfeit shares for other reasons has been held to be illegal (*p*).

Though forfeiture is in the nature of a penalty, equity will not relieve a shareholder from forfeiture if it is duly and *bonâ fide* declared.

Sparks v. Liverpool Waterworks Co. (1807), 13 Ves. 428.

By a byelaw of an incorporated company, shares were to be forfeited if calls were not complied with within ten days. S. was absent from London for twenty-seven days after the call was made. His share was forfeited: **Held,** S. cannot be relieved from the forfeiture.

But a slight irregularity will make the forfeiture void (unless it is the company itself that tries to say that the forfeiture is bad), and the shareholder may bring an action for annulment of the forfeiture.

Garden Mining, etc., Co. v. McLister (1875), 1 App. Cas. 39.

Three directors declared certain shares forfeited; but two of the three had been re-elected at a meeting of which the proper notice had not been given (three directors were a quorum):— **Held,** the forfeiture was bad.

Or he may (if the Article so provide) prove for damages on the winding up of the company (*Re New Chile, etc., Co.* (1889), 45 Ch. D. 598).

Any clause in the Articles is void which provides that a shareholder shall forfeit his shares if he takes any proceedings against the company, or which in any way

(*p*) *Hopkinson* v. *Mortimer Harley & Co.*, [1917] 1 Ch. 646.

restricts the right of a shareholder to present a petition for winding up the company (*Peverill Gold Mines, Limited*, [1898] 1 Ch. 122).

Where the liability of the shareholder to pay the call is questioned, the court may restrain the company from declaring the shares forfeited during the trial of the action (*q*). The plaintiff is usually required to pay the amount of the call into court: but this is not necessarily a condition precedent to the granting of an injunction (*r*).

If shares are forfeited, the company cannot sue the shareholder for the calls which he has not paid unless the Articles expressly so provide. If they do, he cannot be made liable as a contributory for calls, for he has ceased to be a member, but he may be sued as an ordinary debtor to the company.

Ladies' Dress Association v. Pulbrook, [1900] 2 Q. B. 376.

A.'s shares were forfeited for unpaid calls. More than one year afterwards the company was wound up. If A.'s liability depended on his being a contributory to the company, he could not be made to contribute after ceasing to be a member for one year:—**Held**, A. was liable as an ordinary debtor, and could be sued.

SECTION 8.

Surrender.

The articles frequently give power to the directors to accept surrenders of shares; this relieves them from going through the formality of forfeiture, if the share-holder is willing to surrender the shares. But a surrender of shares which are not fully paid can

(*q*) *Lamb* v. *Sambas Rubber Co.*, [1908] 1 Ch. 845.
(*r*) *Jones* v. *Pacaya Rubber Co., Ld.*, [1911] 1 K. B. 455 at p. 459.

only be accepted where a forfeiture would be justified.

Bellerby v. Rowland and Marwood's Co., Limited, [1902] 2 Ch. 14.

Three of the directors of a company, in order to relieve the company of a loss of £4000 which had been incurred, agreed to surrender for the benefit of the company several of their shares. The shares were £11 shares, and had been paid up to the extent of £10 per share. **Held**, the surrender was void, and the directors remained holders of the shares.

The same rule applies to **fully paid shares** which are surrendered for the purpose of being **cancelled** (*s*).

"A company cannot be a shareholder of itself. Every surrender of shares, **whether fully paid up or not**, involves a reduction of capital, which is unlawful except when sanctioned by the court. Forfeiture is a statutory exception and is the only exception" (*t*).

But it has been held that fully paid shares can be surrendered without leave of the court provided the surrender does not involve a reduction of capital (*u*), *e.g.*, in exchange for other shares of the same nominal value (*x*).

A surrender will be void if it amounts to a purchase of the shares by the company, or if it is accepted for the purpose of relieving a member from his liabilities (*Lord Wallscourt's Case*, W. N. (1899), 258).

(*s*) *Bellerby* v. *Rowland & Marwood*, [1902] 2 Ch. 14.
(*t*) Per Cozens-Hardy, L.J., in *Bellerby* v. *Rowland & Marwood* (above). This dictum goes further than *Trevor* v. *Whitworth* (1887), 12 A. C. at p. 418.
(*u*) *Denver Hotel Co.*, [1893] 1 Ch. 495.
(*x*) *Rowell* v. *J. Rowell & Sons, Ld.*, [1912] 2 Ch. 609.

SECTION 9.

Lien.

The Articles generally provide that the company shall have a first **lien** on the shares of each member for his debts and liabilities to the company. See Article 26, on p. 33.

The effect of this is to give a charge to the company over the shares of each member to secure any debt which may be due from the member to the company. The lien also extends to the dividends on the shares.

Power should also be given to the company to enforce the lien by sale. For though the company has a charge there is some doubt whether it is a mortgage **by deed,** and if it is not, no power of sale is implied under s. 19 of the Conveyancing Act, 1881.

The company cannot enforce its lien by **forfeiture:** for this would amount to foreclosure without an order of the court. Any clause in the Articles giving the company power to do so (except where the lien is for unpaid calls), would probably be void (see p. 117, *ante*).

If the company has a lien on A.'s shares for a debt and A. raises the money from B. to pay the debt, A. may call upon the company to assign its lien to B.

Everett v. Automatic Co., [1892] 3 Ch. 506.

E. owed £4670 to the company. The company pressed for payment and threatened to sell E.'s shares. H. agreed to pay the £4670 to the company at the request of E., on condition that the company transferred its lien on the shares to him (H.) The company refused to do this:—**Held,** the company was bound to transfer its lien.

Priority.—If a shareholder mortgages his shares and the mortgagee gives notice to the company, and then the shareholder incurs a liability to the company, the mortgage has priority over the lien to the company.

Bradford Banking Co. v. Briggs (1886), 12 App. Cas. 29.

The Articles gave the company a "first and paramount lien" over the shares for calls, etc. A shareholder deposited his share certificates with the bank as security for an overdraft. The bank gave notice to the company. Then the shareholder became indebted to the company for calls. The company claimed—

(1) A first lien by agreement;

(2) that it need not take notice of any trust:—

Held, the bank have priority. The notice was not "notice of a trust."

But the regulations may provide that any mortgagee who takes with notice of the company's lien, may be postponed to that lien.

The Articles should give the company a lien for all sums in which a shareholder may be "indebted" to the company. This is better than the word "due," for this reason: Suppose a shareholder owes money to the company and gives a bill of exchange payable in six months, the debt is not due, though the shareholder is indebted, so that the lien will only attach if "indebted" is used (*y*).

The company may enforce the lien against th registered shareholder even though he is only a trustee.

New London and Brazilian Bank v. Brocklebank (1882), 21 Ch. D. 302.

The trustees of a marriage settlement invested some of the trust funds in 123 £20 shares in the company. The Articles contained clause 26 on p. 33, and also provided that the lien should apply to a debt due from a member jointly with other

(*y*) *Stockton Iron Co.* (1875), 2 Ch. D. 101.

persons who were not members. One of the trustees was a partner of a firm which owed money to the company :—**Held,** the company has a lien for the partnership debt over the 123 shares.

But the lien of the company would not prevail, if the company had notice of the trust before the debt to the company was incurred (*z*).

It seems to follow that if a shareholder sells his shares, they do not become subject to a lien for debts incurred by him after the transfer has been lodged with the company for registration, even though the company refuse to register the transfer.

If a shareholder only sells some of his shares, the buyer can insist on the company paying itself first out of the shares which are not sold (*Gray* v. *Stone and Funnell* (1893), 69 L. T. 282).

The death of a shareholder does not destroy lien; in fact, the lien is good if it is first imposed after his death (*Allen* v. *Gold Reefs,* [1900] 1 Ch. 656; see p. 50).

(*z*) *Bradford Banking Co.* v. *Briggs & Co.* (1886), 12 A. C. 29.

CHAPTER IX.

CAPITAL.

THE word "capital" is used in several senses—

(1) **Nominal Capital** = the nominal value of the shares which the company is authorised to issue by its Memorandum. This must be stated in the Memorandum, and also each year in the annual summary (*a*).

(2) **Issued capital** = the nominal value of the shares actually issued.

(3) **Paid-up capital** = the amount paid up or credited as paid up on the shares.

(4) **Capital assets** = the actual property of the company.

The phrase "debenture capital" is sometimes used to mean the amount borrowed by the company and secured by debentures.

This is not a proper use of the word "capital," as borrowed money is not capital at all.

SECTION 1.

Classes of Capital.

The capital may be divided into different classes of shares, or it may consist wholly or partly of stock (see p. 127). This may be provided either in the Memorandum or in the Articles. Usually the Memorandum or Articles of Association gives the company

(*a*) Companies Act, s. 26.

power to divide the capital into classes with special, qualified or deferred rights, and the Articles specify the rights of each class of shareholders. If no power is given to sub-divide capital either in the Articles or in the Memorandum, the company can give itself power to do so by altering its Articles (*Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361). See p. 49.

If the rights of the various classes are fixed in the Memorandum, the company cannot change the rights of the different classes (*b*) (unless the Memorandum itself gives the company power to vary the rights (*bb*). If the rights of the different classes of shareholders are fixed by the articles and not by the Memorandum, they can be altered by special resolution without leave of the court. (*c*)

Capital is frequently divided into—

(1) Preference shares;

(2) Ordinary shares;

(3) Deferred shares.

1. **Preference shares.**—The holder of preference shares is usually entitled to a fixed dividend of, say, five per cent. before any dividend is paid on the ordinary shares. But if so, he is (unless the articles expressly so provide) not entitled to more than his five per cent. however prosperous the company may be (*d*).

Preference shares are either **cumulative** or **non-cumulative.** Where they are cumulative, then, if the profits of the company in any year are not sufficient

(*b*) See pp. 130, 131.
(*bb*) *Re Welsbach Co.*, [1904] 1 Ch. 87.
(*c*) *Re Australian Estates Co.*, [1910] 1 Ch. 414.
(*d*) *Will* v. *United Langkat Co., Ld.*, [1914] A. C. 11.

to pay the fixed dividend on the preference shares the deficiency must be made up out of the profits of subsequent years.

Preference shares are presumed to be cumulative, and ambiguous language in the Articles will not be enough to make them non-cumulative.

Foster v. Coles, [1906] W. N. 107, and 22 T. L. R. 555.

The articles originally provided that the preference shares should be cumulative. The Articles were altered on re-construction and the word "cumulative" was omitted:—**Held,** they were still cumulative, as there was no express contrary intention.

But they may be made non-cumulative by express provision or by any language which is sufficiently clear.

Staples v. Eastman Photo Co., [1896] 2 Ch. 303.

The Articles provided that "The holders of preference shares shall be entitled **out of the net profits of each year** to a preference dividend at the rate of ten per cent. per annum:—**Held,** this was sufficient to make the shares non-cumulative (*dd*).

Unless the preference shares are made **"preferential as to capital,"** they are paid off equally with the ordinary shares on the winding-up of the company.

Welton v. Saffery, [1897] A. C. 299, at p. 309.

The original shares were issued to the directors only. Later, more shares were issued as "ordinary," "discount," and "bonus" shares. The "discount" shares were issued at a discount, the bonus shares for nothing. These, of course, had to be paid up in full, but the holders contended that they need only pay up sufficient to pay off the debts, and need not pay the rest of the amount due on their shares for the purpose of making an equal division among the shareholders:—**Held,** the company could have issued shares if it liked, which, **after the debts had been paid,** should be paid in full before any other shares; but the company had not done so. Therefore the whole capital must be paid up, and the surplus, after paying off the debts, divided equally among the shareholders.

(*dd*) And see *Adair* v. *Old Bushmills Co.*, [1908] W. N. 24.

If, however, the preference shares are made "preferential as to capital," any surplus capital (*e*) of the company after payment of debts will (apart from special provisions in the articles (*f*)) be applied first in paying off the capital of the preference shares.

The question whether the preference shareholders have then any further rights in the capital in the absence of express provision in the Articles is in a state of doubt, decisions on the point being in direct conflict (*g*).

Arrears of dividend cannot be paid up to the date of the winding-up unless such dividends have in fact been declared or unless the Articles contain express provisions to this effect (*h*).

2. **Ordinary shares.**—Generally the greater part of the net profits of the company, after paying the fixed dividend on the preference shares (if any), is paid as dividend on the ordinary shares.

As to how such dividends are paid, see Chapter X.

3. **Deferred shares or founders' shares.**—These shares are usually entitled to a proportion of the profits if the dividend on the ordinary shares amounts to

(*e*) As to the meaning of "surplus assets," see *re Ramel Syndicate, Ld.*, [1911] 1 Ch. 749.

(*f*) As in *re W. J. Hall & Co., Ld.*, [1909] 1 Ch. 521, where there were special provisions that arrears of dividend on the preference shares should be paid off first.

(*g*) *In re National Telephone Co., Ld.*, [1914] 1 Ch. 755, Sargant, J., declined to follow *re Espuela Land Co.*, [1909] 2 Ch. 187; on the ground that the judgment in the latter case was based on the view that there was "no rule of law that shareholders having a fixed preferential dividend take that only," and that the Court of Appeal (and now the House of Lords) had decided in favour of such a rule in the absence of express provision in *Will* v. *United Langkat Co., Ld.*, [1914] A. C. 11. Astbury, J., however, in *re Fraser and Chalmers, Ld.*, [1919] 2 Ch. 114, and Eve, J., in *Anglo-French Music Co.* v. *Nicoll*, [1921] 1 Ch. 386, followed *Espuela Land Co.*

(*h*) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86. *New Chinese Antimony Co., Ld.*, [1916] 2 Ch. 115. *Springbok Agricultural Estates, Ltd.*, [1920] 1 Ch. 563.

more than a fixed amount, *e.g.*, the deferred shares may be entitled to half the profits after a dividend of ten per cent. has been paid on the ordinary shares.

Deferred shares are usually taken by the promoters. Sometimes they are allotted to them as fully paid up in consideration of their bearing the expenses of promotion, or they may be issued in satisfaction of amounts due for underwriting commission to persons who subscribe for ordinary shares. In either of these cases a contract or particulars of a contract must be filed with the registrar (*i*), and the number of founders' shares must be stated in the prospectus or statement in lieu of prospectus (*k*).

Reserve capital.—A company may by special resolution declare that any portion of its capital, which has not been already called up, shall not be capable of being called up except in the event of and for the purpose of the company being wound up (*l*).

That is, reserve capital is capital which cannot be called in except on winding up.

Reserve capital cannot be turned into ordinary capital without leave of the court, and it **cannot be dealt with or charged by the directors.**

Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28.

The company by special resolution declared that £5 out of each £10 share should be reserve capital. The company then issued debentures charging its undertaking and property, including its uncalled capital:—**Held,** the reserve capital of £5 per share was not charged, and the debenture holders had not therefore a first claim upon it.

5. **Stock.**—When shares have been fully paid up (*m*),

(*i*) See p. 87. (*k*) See p. 65.
(*l*) Companies Act, s. 59.
(*m*) If stock is issued as partly paid up, the issue is void. *Home and Foreign Investment Co.*, [1912] 1 Ch. 72.

they may be turned into stock (*n*). Stock is not divided into equal parts or shares, and the divisions are not numbered but it may be divided into any amounts. Thus it would be possible to hold £10 6*s.* 8*d.* of stock, though the shares had originally been £100 shares.

It may be either (1) registered stock.

Then a register of stockholders is kept, and stock certificates, similar in form to share certificates, are granted, and the stock is transferred by similar transfers, and the dividends are paid in the same way as in the case of shares.

Or (2) unregistered stock.

Then share warrants are issued to the holders, and these are transferable on delivery.

Stockholders are members of the company, and can vote at meetings, but if the stock is unregistered, they must prove their right to the stock before voting.

The difference between shares and stock is explained by Lord CAIRNS in *Morrice* v. *Aylmer* (1874), 10 Ch. App. 148, at p. 154:

"The use of the term 'stock,' merely denotes that the company have recognised the fact of the complete payment of the shares, and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that stock shall still be the qualification, *e.g.* of directors who must possess a certain number of shares, and that the meetings shall be of persons entitled to this stock who meet and vote as shareholders, in the proportion of shares which would entitle them to vote before the consolidation into stock."

And it was there held that a bequest of shares in a company would include stock (*o*).

(*n*) Notice must be given to the Registrar (Companies Act, s. 42).

(*o*) But a direction in a will to invest in preference stock does not justify investment in preference shares. *Re Willis*, [1911] 2 Ch. 563.

SECTION 2.

Increase and Alteration of Capital.

A company may increase or alter its capital if authorised to do so by its regulations (*p*). No special method is specified in the Act. (Contrast this with **reduction**, which must be by special resolution, confirmed by the court.)

The articles may authorise the increase of capital by an ordinary resolution of the company, or may delegate this power to the directors (*q*). But this does not authorise the directors to issue the new shares, unless the articles so provide (*r*).

Notice of any increase of capital must be given to the Registrar (*s*).

If the regulations do not authorise the company to increase or alter its capital, it may alter its articles by special resolution and give itself the power to do so (*t*).

The new capital may consist of preference, ordinary or deferred shares, provided there is nothing in the Memorandum to prevent it. If there is, the Memorandum may be altered by leave of the court (*x*).

The nominal capital of a company may be increased though it has not yet issued all its authorised capital; but usually the increase is made because the company has issued all its authorised capital and requires more funds, *e.g.*, to extend its business. Thus, the capital may be increased from £20,000 in 2000 ordinary shares of £10 each, by the addition of £30,000 in 30,000 seven per cent. preference shares of £1 each.

(*p*) Companies Act, s. 41.
(*q*) *Mosely* v. *Koffyfontein Mines, Limited*, [1910] 2 Ch. 382.
(*r*) S. C. 1911, A. C. 409.
(*s*) S. 44 (1).
(*t*) The alteration of the articles and of the capital may be effected by one resolution: *Campbell's Case* (1873), L. R. 9 Ch. Ap. at p. 21
(*x*) See p. 130, *post*.

Stamp duty at the rate of £1 per cent. (*xx*) is payable on the amount by which the nominal capital of the company is increased (*y*).

Capital is altered when shares are **consolidated,**

E.g. every twenty 1*s.* shares are turned into one £1 share.

Or **sub-divided.**

E.g. every £1 share is turned into 20 1*s.* shares. This can be done under s. 41 of the Companies Act, provided the proportions of the amounts paid and unpaid remain the same. This requires a special resolution.

On sub-division of shares, preferential rights may be attached to one part of each old share; *e.g.*, each old share may be divided into one preferred share and one deferred share.

Capital may also be altered by being **re-organised,** *i.e.* by altering the rights of the holders of different classes of shares as follows:—

(1) If this involves (a) consolidation of shares of different classes (*z*) *or* (b) the division of shares into shares of different classes *and* (c) an alteration of the Memorandum (*zz*), it must be done by a special resolution confirmed by the court, and no special rights attached to any class can be interfered with except by a resolution passed by a majority in number (*a*) of the shareholders of that class who hold between them at

(*xx*) Finance Act, 1920, s. 39.

(*y*) *Attorney-General* v. *Anglo-Argentine Co.*, [1909] 1 K. B. 677.

(*z*) As to what are different classes, see *United Provident Co.*, [1910] 2 Ch. 477, and see S. C., [1911] W. N. 40, as to procedure when one class has voted against the proposals and subsequently votes for them.

(*zz*) *E.g.*, where the Memorandum divides the capital into preference and ordinary shares, or where it imposes a limit on the amount of dividends payable. *Re Garden Village (Hull), Ltd.*, [1923] W. N. 58.

(*a*) The majority must be at a meeting. Proxies are allowed. *Re Foucar & Co.*, [1913] W. N. 83.

least three-fourths of the capital of that class, and confirmed in the same way as a special resolution (*b*).

(2) If it does not involve consolidation or division or does not interfere with any special privilege, but **does involve an alteration of the Memorandum,** separate meetings of the classes are not required (*c*). Where this is the case, the rights are now frequently altered by an arrangement or compromise approved by the court under section 120 of the Companies Act. (*c*)

(3) If it does not involve any alteration of the memorandum, it may be done by special resolution without the sanction of the court (*d*).

SECTION 3.

Reduction and Diminution of Capital.

Where some of the capital of the company has been lost, it may be doubtful how far the company ought to pay dividends out of its profits without making provision for this loss. If the loss is very great, this might make it difficult for the company to pay dividends at all: consequently the company is given power to write off the lost capital and pay dividends without regard to this loss.

A company may reduce its capital by special

(*b*) Companies Act, s. 45. This does not apply to affecting the rights of the ordinary shareholders by an issue of preference shares. *Re Stewart Carburettor*, [1912] W. N. 100.

(*c*) *Re Nordberg, Ld.*, [1915] 2 Ch. 439; *Re Schweppes, Ld.*, [1914] 1 Ch. 322.

(*d*) *Re Australian Estates Co.*, [1910] 1 Ch. 414; and see p. 49, *ante*, as to the right of the majority to alter the rights of the minority.

resolution confirmed by the court, if its regulations contain power to do so (*e*). This can be done

(1) by reducing the liability of members for uncalled capital;
(2) by writing off lost capital.
(3) by paying off capital which is in excess of the wants of the company, or
(4) in any other way whatever which may be approved by the court (*e*).

It is not sufficient that the Memorandum contains power to reduce, unless the Articles provide for it also (*Re Dexine Patent Packing Co.*, [1903] W. N. 82). If they do not, they must be altered by special resolution, and this must be effected before the special resolution reducing the capital can be passed (*Patent Invert Sugar Co., Ltd.*, 31 Ch. D. 166 (*f*).

The following case is an example of the way in which capital may be altered and reduced by leave of the court:

Re Welsbach Incandescent Co., [1904] 1 Ch. 87.

By the Memorandum, the capital was to be £3,500,000 divided into—

(1) £5 five per cent. cumulative preference shares;
(2) £1 ordinary shares to be paid seven per cent. after (1);
(3) £1 deferred shares to be paid seven per cent. after (2);

and the rights of the different classes might be modified by special resolution—

More than £2,000,000 of the capital was lost.

(*e*) Companies Act, s. 46; and see *Poole* v. *National Bank of China*, [1907] A. C. 229.

(*f*) Note the difference between this case and *Campbell's Case*, p. 129, *supra* (*n.*). If there is no power in the articles to do something which requires only an ordinary resolution, the special resolution altering the article is enough, because the confirmatory resolution in effect alters the articles and at the same moment passes the proposed new resolution; but if a special resolution is needed, three meetings at least are necessary, as the alteration of the Articles is not complete until the special resolution altering them is confirmed at the second meeting.

A special resolution was passed that the capital be reduced to £1,345,000 divided into—

(1) preference shares of 13*s.* each;
(2) ordinary shares of 5*s.* each;
(3) deferred shares of 1*s.* each;

(*i.e.*, each £1 ordinary share became a 5*s.* share, etc.).

Then by a special resolution all these were turned into stock, and each £2 of stock was re-converted into one £1 six per cent. preference share, and one £1 ordinary share :—**Held,** resolution confirmed: the court being satisfied that the £2,000,000 had been really lost, and that the scheme was fair and reasonable.

One form of reduction is an "**all round reduction**"; *i.e.*, the lost capital is written off all the shares in proportion to the nominal value: but it may be written off one class of shares and not off others.

Re Quebrada Copper Co. (1888), 40 Ch. D. 363.

The company lost some capital, and passed a resolution to write it all off the ordinary shares, and not to touch the preference shares :—**Held,** resolution confirmed; but only after full notice of the effect of this resolution had been given to all the shareholders.

Neither form of reduction will be allowed if it is unfair to any class of shareholders.

Barrow Haematite Co., [1900] 2 Ch. 846.

The capital was divided into preference and ordinary shares. The preference shares had no preference as to capital, and no **voting power.** No dividends had ever been paid on the ordinary shares. A resolution was passed to reduce the capital by one-quarter all round :—**Held,** this was not fair on the preference shareholders. Resolution not confirmed.

Reduction of capital has been confirmed—

(i) Though the voting power was thereby altered (*g*).

(ii) Under a scheme by which some shareholders were to take debenture stock instead of their shares (*h*).

(iii) By cancelling stock (*i*).

(*g*) *Re Colmer, Ld.*, [1897] 1 Ch. 524.
(*h*) *Re Thos. de la Rue & Co.*, [1911] 2 Ch. 361.
(*i*) *Re House Property Co., Ld.*, [1912] W. N. 110.

The court may order the reasons for reduction to be advertised (*j*).

A forfeiture of shares may, unless the shares are re-issued, involve a reduction of capital. This appears to be the only case in which a reduction of capital can take place without the leave of the court.

Form of proceedings to obtain the sanction of the court. The special resolution is first passed. Then the company must apply to the court by petition to confirm the resolution.

The petition is in the following form:

IN THE HIGH COURT OF JUSTICE.
Chancery Division.
MR. JUSTICE ——.

In the Matter of the Blank Company, Limited and Reduced,
and
In the Matter of the Companies (Consolidation) Act, 1908,
To His Majesty's High Court of Justice.

The humble petition of the Blank Company, Limited and Reduced, showeth as follows:

(1) Your petitioner, the above-named company, was incorporated, etc.

Here state: The nature and history of the company.
The special resolution.
Facts showing that it is a proper case for reduction.

Set out the form of minute of the proposed order, and add—

Your Petitioner the Company therefore humbly prays—

(1) That the reduction of capital to be effected by the special resolution mentioned in paragraph of the Petition may be confirmed.

(2) That the addition of the words "and reduced" to the company's name may be dispensed with.

(3) Or that such other order may be made in the premises as to the Court shall seem meet.

And your petitioner will ever pray, etc. (*jj*)

(*j*) Companies Act, s. 55. *Re Truman Hanbury & Co.*, [1910] 2 Ch. 498.

(*jj*) See Palmer, Company Precedents, 12th ed., p. 1211.

If the order is made, and the petition confirmed, the order must be advertised, and the words "and reduced" added to the name of the company for a short period (*k*).

If the reduction involves a return of capital or a reduction of liability for uncalled capital, an inquiry is ordered as to the debts and liabilities of the company by means of advertisements, and a list of creditors is settled by the court. All the creditors must consent or be paid off.

The court can dispense with the advertisements in a proper case; but cannot dispense with settling the list of creditors (*l*).

If the reduction does **not involve a return of capital or reduction of liability,** no enquiry for creditors is necessary, and the use of the words "and reduced" may be dispensed with, *e.g.*, if the company is carrying on business abroad (*Sumatra Tobacco Co.*, W. N. (1898) 80). The object of the addition of these words is to give notice to creditors who may be giving credit to the company on the faith of the amount of capital which appears in the Memorandum.

Where capital is reduced on the ground that it has been lost, evidence should be given to prove the loss (*m*).

(*k*) Companies Act, s. 48.

(*l*) *Re Lamson Store Co., Ld.*, [1895] 2 Ch. 726.

(*m*) In *Re Louisiana, etc., Co.*, [1909] 2 Ch. 552, the reduction was confirmed without any evidence of the loss; but it appears that Lord Macnaghten, in *Poole* v. *National Bank of China*, [1907] A. C. 229, merely laid down the rule that the Court has jurisdiction to sanction a reduction for any reason considered fair and proper without proof of loss; but where the reduction is based upon loss of capital, the loss should be proved (*Caldwell* v. *Caldwell & Co.*, [1916] W. N. 70). It should be noted that in the Louisiana Co.'s case it was certified that there were no creditors. As to the form of order see *Lees Brook Spinning Co.*, [1906] 2 Ch. 394, followed in 1906 W. N. 202, and 1907 W. N. 23.

The County Court has jurisdiction to sanction the reduction if the capital is not more than £10,000, but the High Court has also jurisdiction in such a case (*n*).

Debenture-holders are not entitled to object to the reduction if there is no return of capital to the shareholders and no reduction of their liability (*o*).

Capital may be "**diminished**" by cancelling shares which have not been taken up or agreed to be taken up by any person. This may, if the articles so provide, be done by an ordinary resolution (*p*). It is not a reduction of capital (*q*).

A company may reduce its paid-up capital without reducing its nominal capital.

This is effected by a special resolution that accumulated profits shall be returned to the shareholders in reduction of the amount paid up on their shares, the liability on the shares being increased by the same amount (*r*). If this repayment is made out of profits, the leave of the court is not required (*s*). The amount so returned will be payable to a tenant for life as income unless resolutions have been passed to capitalise it (*t*).

(*n*) *Re Portsmouth, etc., Cleaner Co.*, [1908] W. N. 203.
(*o*) *Meux's Brewery Co.*, [1919] 1 Ch. 28.
(*p*) Companies Act, s. 41 (1).
(*q*) Companies Act, s. 41 (4).
(*r*) Companies Act, s. 40.
(*s*) See generally *Neale* v. *City of Birmingham Tramways*, [1910] 2 Ch. 464, where some of the shares were fully paid and some not.
(*t*) *Re Piercy*, [1907] 1 Ch. 289.

CHAPTER X.
DIVIDENDS.

DIVIDENDS are the profits of trading divided among the members in proportion to their shares.

The proportion may be determined by agreement in the Articles; if not, dividends are paid on each share in proportion to the nominal value of that share, without reference to the amount paid up on it.

Oakbank Oil Co. v. Crum (1882), 8 App. Cas. 65.
The capital was divided into 40,000 £1 shares fully paid up, and 20,000 £1 shares with 5*s.* only paid up. A dividend was declared in proportion to the amount paid up on the shares:— **Held**, this could not be done.

The Articles therefore sometimes provide that the dividends shall be paid to the shareholders "in proportion to the amounts paid up on the shares held by them respectively."

The dividends in each year on the ordinary shares vary with the amount of the profits made by the company; but the dividends on the preference shares are usually at a fixed rate.

The power to pay dividends is not expressly given by the Companies Acts, but it is inherent in every trading company, and it need not be given by the Memorandum.

The mode of payment of dividends is determined by the Articles. These generally provide that dividends are to be paid by the directors with the sanction of a general meeting, and may be paid by cheque or warrant sent by post to the registered address of each shareholder.

If so, the posting of the warrant amounts to payment, and if the warrant is lost, the shareholder's remedy is to sue upon the lost warrant (*z*).

Interim Dividends.—The articles usually provide that the directors may pay interim dividends.

An **interim** dividend is a dividend declared at any time between two ordinary general meetings (*a*).

The declaration of a dividend creates a debt (*b*) from the company to each shareholder, for which he is entitled to sue.

Re Severn and Wye Rail. Co., [1896] 1 Ch. 559.

R. held shares in the company upon which dividends were declared from 1832 to 1873. These dividends were never claimed or paid. In 1896, the question arose whether the right to the dividends was barred:—**Held,** when a company declares a dividend, a debt immediately becomes payable to each shareholder, for which he can sue at law, and the Statute of Limitations immediately begins to run.

The debt is in the nature of a specialty debt, and is not barred until twenty years have elapsed (*c*).

The most important rules as to payment of dividends are (1) **dividends should only be paid out of profits** (*cc*), and (2) **dividends cannot be paid out of capital** (*d*).

Exception: Where shares are issued for raising money to be spent on the construction of works, the company may pay interest on the capital so raised, though no profits are earned, if the payment is (1) authorised by the Articles, (2) sanctioned by the Board of Trade, and (3) not more than 4 per cent. (*e*).

(*z*) *Thairlwall* v. *Great Northern Railway Co.*, [1910] 2 K. B. 509.

(*a*) *Re Jowitt*, [1922] 2 Ch. 442.

(*b*) As between tenant for life and remainderman dividends may be apportioned (*Re Oppenheimer*, [1907] 1 Ch. 399).

(*c*) *Artisans' Land & Mortgage Corp.*, [1904] 1 Ch. 796.

(*cc*) As to the meaning of "profits," see *Spanish Prospecting Co., Ld.*, [1911] 1 Ch. 92.

(*d*) *Re Sharpe; Masonic Co.* v. *Sharpe*, [1892] 1 Ch. 154.

(*e*) Companies Act, s. 91.

These rules are clear, but difficulties may arise in determining in any particular case whether the dividends have really been paid out of capital or not.

Thus, suppose a company has some freehold premises which are increasing in value, and leasehold premises which are decreasing, and the business of the company is to buy and sell coal: and suppose the capital account of the company for the last two years shows the following result:

Capital Account.

	For 1909.	For 1910.
	£	£
(1) Leaseholds worth	10,000	8,000
(2) Freeholds worth	10,000	11,000
(3) Stock of coal worth ...	10,000	5,000
(4) Excess of receipts for coal over cost of coal bought ...	5,000	15,000

Disregarding (1), (2), and (3), the profits for 1910 would appear to be £15,000. But this is obviously too much, for the stock of coal has been lessened by £5000, and this should be deducted. Also the leasehold and freehold premises together are worth £1000 less than in the previous year, and this £1000 **ought** to be taken into account in estimating the profit for the year. But there appears to be no **legal** necessity to deduct the £1000.

The cases seem to show that the capital account and the revenue account must be kept separate.

A distinction must be drawn between—

(1) "**Circulating capital,**" *i.e.*, "property acquired or produced with a view to re-sale or sale at a profit" (*e.g.*, the coal in this case), and

(2) "**Fixed capital,**" *i.e.*, "property acquired and intended for retention and employment with a view to profit" (*f*) (*e.g.*, the leaseholds and freeholds above).

(*f*) See the definitions in *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266, at p. 286.

Both legally and commercially any loss of circulating capital must be accounted for before the profits are ascertained.

Commercially also any loss or depreciation of "**fixed capital**" should be taken into account, and this is generally done by means of a sinking fund; but legally there are many cases in which profits may be paid away as dividends without providing for loss or depreciation of fixed capital. Any improvement or appreciation of fixed capital may, however, be counted as profit.

The following cases show the extent of the rule:

Lee v. Neuchatel Asphalte Co. (1887), 41 Ch. D. p. 1.

The company was formed to take over a concession to work asphalte, granted for twenty years, but renewed in 1871 for another twenty years. The concession was paid for by 100,000 shares and £8000 in cash. The accounts of 1885 showed a surplus of £17,000. The directors proposed to pay away in dividends £16,000 of this, without making any allowance for the fact that the concession was running out:—**Held,** (1) the assets had not depreciated (owing to the renewed concession, they were more valuable than when the company was formed); (2) the company was not bound to make up in available assets the whole of its nominal share capital, before paying dividends; (3) the directors were not bound to set aside a sinking fund.

The next case carries the rule further:

Verner v. General Commercial Trust, [1894] 2 Ch. 268.

The company was formed to purchase investments, and to borrow and lend money and pay the profits as dividends. In 1894, the receipts exceeded the expenditure by £23,000; but many of the investments had deteriorated, making a loss on the value of the assets of £250,000:—**Held,** "the statutes do not expressly prohibit payment of dividends out of capital, but their provisions are wholly inconsistent with the return of capital to shareholders." The dividend may, however, be paid in this case. There is no legal liability to have even a sinking fund.

Note that in this case the investments were intended to be retained, and it seems only reasonable that a company should not be bound to meet every depreciation of its investments

before paying dividends. For such depreciation may often be only temporary.

Had the business of this company consisted of speculating in investments, the investments would have been circulating capital, and any loss must have been accounted for.

These cases were followed in *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266; *Lawrence* v. *West Somerset Mineral Railway*, [1918] 2 Ch. 250; and *Stapley* v. *Read Bros.*, [1924] 2 Ch. 1. Their effect is explained with a warning in—

Bond v. Barrow Haematite Co., [1902] 1 Ch. 353.

A smelting company lost £200,000 owing to a lease of certain mines of iron ore becoming useless through flooding, and £50,000 owing to depreciation of its property generally: **Held**, *Verner's Case* does not lay down a general rule that in **every** company fixed capital may be sunk or lost; but that there are companies in which this **may** be done. The £200,000 loss is a loss of circulating capital, there being no difference, in this case, between mines of ore and a stock of ore.

As to the £50,000 loss, the burden of proof is on the directors to show (1) that it is fixed capital, and (2) that in a company of this nature such fixed capital may be sunk. *Lee* v. *Neuchatel* is not an authority for stating that no company owning depreciating property need ever create a depreciation fund.

The result of these cases is, that it is usually legal, but not altogether safe, for directors to pay away profits as dividends without making some provision for making good loss of fixed capital.

The balance-sheet ought to be made out on sound business lines. The proper way is to take the facts as they stand, estimate the value of the property and the losses sustained as compared with the previous year, and strike the balance. If this is done *bonâ fide*, the dividend will not be fraudulent, even if some of the property was in fact valued too high.

National Bank of Wales, [1899] 2 Ch. 629, at p. 670, affirmed as **Dovey v. Cory**, [1901] A. C. 477.

Bad debts were included in the balance-sheet as assets: if these had been written off, no dividend could have been paid. The defendant director relied on the statements of the manager that the debts were good: **Held**, a director is not liable if he acts on the advice of a person to whom matters of detail have been properly delegated, and whom he believes to be capable and honest. The defendant was not liable.

If directors do pay dividends out of capital, they may be sued for the whole amount of the dividend actually paid out of capital. But they may recover from each shareholder the dividend received by him, if he knew that it was paid out of capital; and a shareholder who took the dividend with such knowledge cannot sue the directors (*g*); but this would not prevent him from obtaining an injunction to restrain the future payment of dividends out of capital or other illegal acts in the future (*h*).

As to accretions.—Any increase in the value of the assets may be paid out as dividend (*i*).

Lubbock v. British Bank of South America, [1892] 2 Ch. 198.

The company had part of its undertaking in Brazil with a capital of £500,000. It sold this part for £875,000 and agreed not to carry on a similar business. Later, the company paid £75,000 to be released from this agreement, so that the net profit on the sale (after various other payments) was £205,000 :—**Held**, this may be distributed as profit. (The judgment of CHITTY, J., at pp. 200, 201 should be read as to the mode of taking accounts.)

The whole accounts for the year must be taken into account.

(*g*) *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558.
(*h*) *Mosely* v. *Koffyfontein Mines, Ld.*, [1911] 1 Ch. 73.
(*i*) *Spanish Prospecting Co.*, [1911] 1 Ch. 92. But unless the increase has been realised by sale of the assets, it is dangerous to take it into account in distributing profits, unless it is clearly proved to be a permanent increase in value.

Foster v. New Trinidad, etc., Limited, [1901] 1 Ch. 208.

The company had bought up an old company: among the assets were promissory notes for $127,000 which were treated in the balance-sheet as a bad debt and of no value. The notes were unexpectedly paid up in full. The directors proposed to distribute $100,000 of this as profit:—**Held,** "the question of what is profits depends on the whole accounts fairly taken for the year, capital as well as profit and loss, and although dividends may be paid out of earned profits in proper cases though there has been a depreciation of capital, an estimated accretion in value of one item cannot be deemed to be profits without reference to the whole accounts fairly taken."

On the whole, in practice, business principles are generally followed, and this was meant to be done, otherwise the provisions of the Companies Act allowing capital to be written off when lost would be useless (*j*).

Profits paid to a reserve fund remain profits and may be paid as dividends though there is a loss on capital (*k*).

Shareholders cannot insist on the payment of dividends, even where the profits are amply sufficient, if the directors decline to declare a dividend, except in case of fraud (*l*).

Dividends must be paid in cash unless there is an express agreement to accept shares or debentures, etc.

Hoole v. Great Western Rail. Co. (1867), 3 Ch. App. 262.

The company had made profits, but had no available capital, and proposed to give the shareholders fully-paid shares instead: —**Held,** the shareholders are entitled to claim payment in cash.

Capitalisation of profits.—In recent years many companies have "capitalised" profits by issuing fully paid shares to the shareholders. This can be done provided there are sufficient undistributed profits

(*j*) See p. 131.

(*k*) *Re Hoare & Co., Limited,* [1904] 2 Ch. 208, at p. 213. But see *re Tilt Cove Copper Co.,* [1913] W. N. 243, as to the right of debenture holders to intervene.

(*l*) *Bond* v. *Barrow Haematite Co.,* [1902] 1 Ch. 353.

available; for though a company cannot issue "*bonus*" shares, it can, if its Articles so provide, declare a dividend or bonus out of its undistributed profits, and at the same time issue a corresponding number of new shares; and it can apply the dividend and bonus, which then belong to the shareholders, in paying up in full for the shares issued to them.

Sometimes the shares are issued as "bonus" shares without these steps being taken. If so, the issue is of doubtful validity; but it may possibly be upheld on the ground that the company has only done directly what it could have done in a roundabout way (*m*).

The effect of capitalisation is that the company does not part with any of its assets; but each shareholder gets a larger number of shares.

Shares of the company distributed in this way are not income and are not liable to super-tax (*n*); but if shares in another company are distributed, super-tax is payable (*o*).

When shares are transferred at or near the time of a declaration of dividend, the agreement usually specifies whether the transferee or the transferor shall get the benefit of the dividend. If the transferee is to get the dividend, the transfer is said to be "**cum dividend,**" if not, "**ex dividend.**"

If there is no agreement as to dividends the buyer is entitled to all dividends declared after **the date of the agreement** for sale.

Black v. Homersham (1878), 4 Ex. D. 24.

August 1st, sale of shares by auction; by the conditions of sale the transfer was to be completed on August 29th. August 24th, dividends declared. August 29th, transfer completed:—**Held**, the dividends belong to the buyer. Completion relates back to the time when the purchase was made. The buyer bought the shares on that day at their then value.

(*m*) *Swan Brewery* v. *The King*, 1914, A. C., at p. 236.
(*n*) *Inland Revenue Commissioners* v. *Blott*, [1921] A. C. 171.
(*o*) *Pool* v. *Guardian Investment Trust Co.*, [1922] 1 K. B. 347.

CHAPTER XI.

BORROWING POWERS.

Every trading company has an implied power to borrow money for the purpose of its trading; but this power cannot be exercised until the minimum subscription has been subscribed (*a*). If a company has power to borrow, it has also power to charge its property as security for payment of the loan.

General Auction, etc., Co. v. Smith, [1891] 3 Ch. 432.

The company was formed for the purchase and sale of estates, to accept loans on deposit and make advances. The Memorandum contained no power to borrow. The company borrowed on the security of some of its land in order to pay back a deposit:— **Held**, being a trading company, it had full power to borrow and charge its property.

The borrowing powers of a trading company are generally exercised by the directors, but this depends on the Articles.

Other companies have no power to borrow unless the Memorandum of Association gives them power to do so; but they may by applying to the court extend the Memorandum (see p. 25).

Sometimes the Memorandum limits the power to borrow.

E.g., the company may not borrow more than two-thirds of its paid-up capital.

(*a*) Companies Act, s. 87.

If a company borrows beyond its powers, the borrowing is **ultra vires** and void, and **the securities given are void,** and the lender cannot sue the company for the return of the loan: but

(1) If the money has not been spent, he can get an injunction to prevent the company from parting with it; or

(2) He may have an action against the directors on an implied warranty of authority;

Weeks v. Propert (1873), L. R. 8 C. P. 427.

A railway company had fully exercised its borrowing powers. The directors advertised for money to be lent on the security of debentures. W. lent £500 and received a debenture. The debenture was declared void:—**Held,** he could sue the directors for breach of warranty, implied from the prospectus that they had power to issue such debentures.

or

(3) If it has been used to pay off debts which could have been enforced against the company, the lender may sue the company, being subrogated to the rights of the creditors who were paid off.

It is on this principle that "**Lloyd's bonds**" are valid: *e.g.* a railway company which has exhausted its powers of borrowing, becomes indebted to a contractor for work done. The company gives him in payment bonds for the amount due, payable at a future date with interest, charged upon its property.

The principle is that a company which borrows to pay off existing debts does not thereby increase its liabilities (*b*).

(*b*) *Harris Calculating Machine Co.*, [1914] W. N. 133.

Neath Building Society v. Luce (1889), 43 Ch. D. 158.

A building society became indebted to some of its members for principal and interest due on a mortgage. It borrowed money, **ultra vires**, to pay off principal and interest:—**Held**, the lenders had a good loan, as they were subrogated to the rights of the creditors paid off.

But this subrogation does not give the lenders the same priority that the original creditors had over the other creditors of the company.

Re Wrexham, Mold, etc., Railway Co., [1899] 1 Ch. 440.

The railway company had borrowed up to the full extent of its powers, the loans being secured by A., B. and C. debentures—the A. debentures had priority over the B. and C. debentures. A bank advanced money to pay off the interest on the A. debentures, and then claimed to stand in the place of the A. debenture holders and to be repaid their loan before the B. or C. debentures were paid:—**Held**, when a company borrows money, **ultra vires**, the lender, so far as the money is applied in discharging the legal debts of the company, is entitled to have the **loan treated as valid**, but not to have a charge in priority to the other creditors.

A company may charge its **uncalled capital** if the Memorandum or Articles allow it, or if they contain words wide enough to cover it.

Newton v. Debenture Holders of Anglo-Australian Co., [1895] A. C. 244.

The Memorandum gave power to borrow "on any security of the company" (*c*):—**Held**, these words authorise a charge on the uncalled capital.

The use of the word "property" in the instrument creating the charge, is not enough to actually charge the uncalled capital.

(*c*) These appear to have been the words upon which the decision turned, and not the further words, "upon the security of any property of the company:" see *Stanley's Case* (1864), 4 De G. J. & S. 407; *Re Streatham Estates Co.*, [1897] 1 Ch. 15.

Re Russian Spratts Patent Ltd., [1898] 2 Ch. 149.

The company had power to borrow and charge its uncalled capital. It issued debentures charging its "undertaking and all property to which it now is or **shall at any time become entitled**":—**Held**, this did not create a charge on the uncalled capital.

A mortgage of uncalled capital is usually enforced by the appointment of a receiver (see p. 162) and by an order of the Court giving the receiver power to use the name of the liquidator for the purpose of making calls (*d*).

A company cannot borrow on the security of its **reserve** capital (see p. 127), nor of its books, for they must be kept at the office of the company and be open for inspection. If, therefore, the company charges all its undertaking, the liquidator, on a winding-up, has a better right to the books than the receiver appointed by debenture-holders (*Engel* v. *South Metropolitan Co.*, [1892] 1 Ch. 442).

Money borrowed by a company may be secured by any one of the following securities or by several of them at once:

(1) A legal mortgage of specific parts of its property.

A company can mortgage its freehold or leasehold property in the same way as an ordinary person; but such mortgages **must be registered**—

(a) On the register kept by the company.

Every company must keep a register of mortgages "specifically affecting property of the company," with a description of the

(*d*) *Re Westminster Syndicate, Limited*, [1908] W. N. 236.

property charged, the amount of the charge, and the names of the mortgagees (*e*).

Failure to register under this section does not make the mortgage void (*f*).

(b) On the register kept by the Registrar, but only if it is a mortgage of land or for the purpose of securing an issue of debentures, or for any of the other purposes mentioned on p. 167 (*g*).

Non-registration under this section makes the security void.

(2) An equitable mortgage by deposit of title deeds.

This must be registered on the company's register, and if it is for any of the purposes mentioned on p. 167, it must be accompanied by some writing to be filed with the Registrar under s. 93.

(3) A mortgage of chattels.

This must always be registered on the company's register and with the Registrar; for by section 93 of the Companies Act any mortgage created by an instrument which, if executed by an individual, would be a bill of sale, must be registered: and a mortgage of chattels by an individual is almost always a bill of sale under the Bills of Sales Act, 1882 (*h*).

(4) Bonds (see p. 146).

(5) Promissory notes and bills of exchange.

These may be made or accepted on behalf of the company by any person having its authority (*i*), and if the company has on a fair construction of its Memorandum power to do so (*k*).

(6) A floating charge evidenced by debentures (see Chap. XII.).

(7) Debenture stock (see p. 150).

(*e*) Companies Act, s. 100.
(*f*) *Wright* v. *Horton* (1887), 12 A. C. 371: penalty £56.
(*g*) Companies Act, s. 93.
(*h*) See 41 & 42 Vict. c. 31, s. 4.
(*i*) Companies Act, s. 77.
(*k*) *Peruvian Railways* v. *Thames, etc., Co.* (1867), L. R. 2 Ch. 617, 623.

CHAPTER XII.

DEBENTURES.

Section 1.

Debentures and Debenture Stock.

A **debenture** is a document given by a company as evidence of a charge created by the company usually in return for a loan.

The word has been used to cover many things, but it generally means one of a series of documents described as debentures all ranking *pari passu*, by each of which a company promises to pay a fixed sum and interest, and charges all its property present and future.

Debenture stock.—Some difficulty is often felt in attempting to distinguish between debentures and debenture stock; but the difficulty arises from trying to contrast an instrument securing a debt with a debt itself of another nature, and from the fact that the word "debenture" is often used loosely as referring to the debt secured by debentures. In other words, as in the case of a debenture, there is a debt due from the company secured or evidenced by a document called a **debenture,** so in the case of debenture stock, there is a debt due from the company, called debenture stock,

and secured or evidenced by a document called a **debenture stock certificate.**

Debenture stock is a debt, generally secured by a trust deed; it is subdivisible, but otherwise is much the same as a debt secured by debentures.

The difference between a debt secured by debentures and debenture stock is very like the difference between shares and stock (*b*).

The liability of the company is regarded as a liability to pay an annuity rather than as a liability to repay a loan.

"The transaction . . . is one of sale and purchase of an annual sum with a superadded right on the part of the purchaser to have, in certain defined events, a lump sum, . . . paid to him in lieu of further annual payments" (RIGBY, L.J., [1899] 1 Q. B., p. 138).

The phrase "**mortgage debentures**" is only another name for **debentures** creating a charge on the property of the company; but the Stock Exchange objects to an instrument being called a **mortgage debenture** unless it is secured by a trust deed. This is frequently done. See pp. 155 and 163.

There are several kinds of debentures, of which the most usual are—

(1) Debentures payable to registered holder;
(2) Debentures payable to bearer.

SECTION 2.

Debentures Payable to Registered Holder.

The following is a common form of **debenture payable to registered holder:**

(*b*) A bequest of debentures will carry debenture stock (*Re Herring*, [1908] 2 Ch. 493, at p. 498).

(Registered with the Registrar of Companies, 24th May, 1924.)

BLANK, LIMITED.

Registered office:

Debenture.

No. 175. £100.

1. Blank, Limited (hereinafter called "the company"), will, on the 1st day of January, 1930, or on such earlier day as the principal money hereby secured becomes payable in accordance with the conditions endorsed hereon, pay to , of , or other the registered holder hereof for the time being, his executors, administrators, or assigns, the sum of one hundred pounds.

2. The company will in the meantime pay to such registered nolder interest thereon at the rate of five per centum per annum, by half-yearly payments on the first day of July and the first day of January in each year, the first of such half-yearly payments to be made on the 1st day of July next.

3. The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

4. This debenture is issued subject to the conditions endorsed hereon, which are to be deemed part of it.

Given under the common seal of the company this 19th day of May, 1924.

(Seal.) The common seal of the company was affixed hereto in the presence of

} Directors.

, Secretary.

THE CONDITIONS BEFORE REFERRED TO.

1. This debenture is one of a series of debentures issued or to be issued by the company for securing principal sums not exceeding in the aggregate the sum of £100,000. The debentures of the said series are all to rank *pari passu* as a first charge on the

property hereby charged, without any priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge on any of its property and assets in priority to the said debentures.

2. A register of the debentures will be kept at the company's registered office, wherein will be entered the names, addresses, and descriptions of the registered holders, and particulars of the debentures held by them respectively. The said register will at all reasonable times during business hours be open to the inspection of the registered holder thereof or his legal personal representative.

3. The registered holder or his legal personal representative will be deemed to be exclusively entitled to the benefit of this debenture, and the company and all persons may act accordingly. The company shall not be bound to enter in the register notice of or in any way to recognise any trust or the right of any person other than the registered holder to any benefit under this debenture, save as herein provided.

* * * * *

5. Every transfer of this debenture must be in writing under the hand of the registered holder hereof or his executors or administrators. The instrument of transfer must be delivered at the registered office of the company, duly stamped, with a fee of two shillings and sixpence and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered, and a note of such registration endorsed hereon.

6. No transfer will be registered during the seven days immediately preceding the days by this debenture fixed for payment of interest.

7. In the case of joint registered holders the principal money and interest hereby secured will be deemed to be owing to them upon a joint account.

8. The principal money and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of the registered holder for such principal money and interest shall be a good discharge to the company.

9. The company may at any time give notice in writing to the registered holder hereof, his executors or administrators, of its

intention to pay off this debenture, and upon the expiration of one calendar month from such notice being given the principal money hereby secured shall become payable.

10. The principal money hereby secured shall immediately become payable—

(a) If the company make default for a period of three calendar months in the payment of any interest hereby secured, and the registered holder hereof, after the expiration of the said period of three calendar months, and before such interest is paid, by notice in writing to the company call in such principal money.

(b) If a distress or execution be levied or sued out upon or against any of the property and assets of the company, and be not paid out within seven days.

(c) If an order be made or an effective resolution be passed for the winding up of the company.

(d) If a receiver of the property and assets of the company be appointed by any court of competent jurisdiction.

11. The principal money and interest hereby secured will be paid at the company's bankers for the time being or at the registered office of the company.

12. A notice may be served by the company upon the holder of this debenture by sending it through the post in a prepaid letter addressed to such person at his registered address.

13. Any notice served by post shall be deemed to have been served at the expiration of twenty-four hours after it was posted, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

14. At any time after the principal money hereby secured becomes payable, the registered holder of this debenture may by writing under his hand appoint any person or persons to be a receiver or receivers of the property hereby charged.

Any receiver so appointed shall have power—

(1) To get in and take possession of all or any of the property hereby charged.

(2) To carry on the business of the company.

(3) To sell any of the property hereby charged.

(4) To make any arrangement or compromise which he shall consider to be in the interests of the debenture holders.

A receiver so appointed shall be deemed to be the agent of the company, and the company shall be solely responsible for his acts or defaults and for his remuneration. The provisions of sects. 19, subsect. (1), 21, 22, 23, and 24, subsects. (3), (4), (6), (7), and (8) of the Conveyancing Act, 1881, as amended by the Conveyancing Act, 1911, and the powers thereby conferred on a mortgagee or receiver shall, so far as applicable, apply to the receiver so appointed as if such provisions were incorporated herein, save that all moneys received by such receiver, after providing for the matters specified in clauses (i) to (iii) of sect. 24, subsect. (8) aforesaid and for all costs, charges, and expenses of or incidental to the exercise of any of the powers of such receiver, shall be applied in or towards satisfaction *pari passu* of the debentures.

15. The registered holder shall have the benefit of the trust deed dated, etc., and made, between the company and A. and B. as trustees for the debenture-holders.

As to the form.—Debentures need not be by deed (*c*), but if not, the consideration must be stated. They may be, and often are, accompanied by a trust deed vesting specific property of the company in trustees for the debenture holders. Sometimes they create a charge over specific property only.

The date fixed for repayment of the capital is generally five, ten or twenty years after the issue, or they may be payable on demand (*cc*); or they **may be perpetual.** If so, the capital money only becomes payable if any of the things specified in condition 10 should happen.

Debentures could always be made "perpetual" in the sense that there need not be any time fixed within which the company was *bound* to pay them off.

(*c*) *Re Fireproof Doors, Ltd.*, [1916] 2 Ch., at p. 150.

(*cc*) If payable "on or after" a fixed date, this means "payable on demand after" that date. The prospectus cannot be referred to for the purpose of explaining the debenture. *Re Tewkesbury Gas Co.*, [1911] 2 Ch. 279, [1912] 1 Ch. 1.

But a company could not issue perpetual debentures in the sense that the company **could never pay them off** without the consent of the debenture-holder, unless the company had express power to do so (*d*).

Now by section 103 of the Companies Act a condition in any debentures making the debentures irredeemable is not void.

The word "irredeemable," if strictly construed means that the company must never pay off the debentures; but the context may show that it means that the debenture holder can never demand payment (*e*).

The interest on debentures is a debt, and may be paid out of capital (*f*).

As to condition 1.—"*Pari passu*" means that all the debentures of this series are to be paid rateably, so that if there is not enough to go round, they shall all abate proportionally.

The Midland Express, Ld., [1913] 1 Ch. 499.

The company had issued £100,000 of debentures payable "pari passu." One of the debenture holders commenced an action to realise the security, and the usual judgment was made in June, 1912, directing enquiries as to the amounts due to the debenture holders. The interest on some of the debentures had been paid down to 1906, but on others not since 1902.

In July, 1912, the master made his certificate of the amount then due for principal and interest to each debenture holder.

The net assets amounted to £12,464. It was claimed that this sum must be applied, first in equalising the arrears of interest:—**Held**, the £12,464 must be divided among the debenture holders in proportion to the amount found due to them for capital and interest at the date of the master's certificate.

If the words "pari passu" were not put in, the

(*d*) *Southern Brazilian, etc., Co.*, [1905] 2 Ch. 78.
(*e*) *Re Joseph Stocks, Ld.*, [1912] 2 Ch. 134 (*note*).
(*f*) And may be so treated in the accounts (*Hinds* v. *Buenos Ayres, etc., Co.*, [1906] 2 Ch. 654).

debentures would be payable according to the date of issue, or if they were all issued on the same day, then according to numerical order (*Gartside* v. *Silkstone, etc. Co.* (1882), 21 Ch. D. 762: see below).

If these words are put in, a debenture-holder who seeks to enforce his security must sue on behalf of himself and all other debenture-holders of the same series. But he may take other steps against the company to get his own debt paid without consulting the interests of the others, provided he does not attack any specific asset of the company.

The company cannot create a new series to rank *pari passu* with the old series, unless power to do so is expressly reserved.

Gartside v. Silkstone, etc., Co. (1882), 21 Ch. D. 762.

150 debentures for £100 each were issued on the same day, numbered 501–650. On Nos. 501–600 it was stated that the issue was for £10,000, to be paid *pari passu*. On Nos. 601–650 it was stated that the issue was for £5000 to be paid "*pari passu*" :—**Held**, the 100 must be paid before the 50. The presumption is that deeds are executed according to their dates, and in this case (the date being the same) according to their numbers; and you cannot look **outside the deeds themselves** to prove that this was not so. (N.B.—If the first deeds had contained power to issue another £5000 *pari passu* with the first issue, the presumption might have been rebutted from the deeds themselves.)

"**Floating charge.**"—This means that the assets of the company are charged with the payment of the debt, but **the company may deal with any of its assets in the ordinary course of business, until the charge becomes a fixed charge.** This happens when the money becomes payable under condition 10, **and** the debenture holder takes some steps to

enforce his security. The charge is then said to "Crystallise."

Re Panama Co. (1870), 5 Ch. 318.

The company charged its "undertaking":—**Held**, this is a good charge. "The word 'undertaking' necessarily infers that the company will go on, and that the debenture-holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for payment of his principal, and that was unpaid."

The characteristics of a floating charge are stated by ROMER, L.J., in—

Re Yorkshire Woolcombers' Association, [1903] 2 Ch. 284.

The company gave a charge over its book debts, present and future:—**Held**, any mortgage by a company which contains the three following characteristics is a floating charge:

(1) It is a charge on a class of assets, present and future;

(2) That class is one which, in the ordinary course of business, would be changing from time to time; and

(3) It is contemplated that until some steps are taken the company shall carry on its business in the usual way.

Unless otherwise agreed, this leaves the company free to make specific mortgages of its property having priority over the floating charge.

Governments Stock Co. v. Manila Rail. Co., [1897] A. C. 81.

The debentures created a floating charge. Three months' interest became due, but the debenture-holders took no steps. The company then made a mortgage of a specific part of its property:—**Held**, the mortgage has priority. The debentures remained merely a floating security until the debenture-holders took some steps to enforce their security (*g*).

In fact the company **can deal with its property in any way authorised by its Memorandum** of

(*g*) See *Cox-Moore* v. *Peruvian Corporation, Limited*, [1908] 1 Ch. 604.

association **so long as it remains a going concern** (*h*).

E.g. it may assign the rents of land which is subject to a floating charge (*i*).

It has been held that a company may even sell its whole undertaking if that is one of its objects specified in the Memorandum (*j*).

A floating charge is also **liable to be postponed** to the rights of the following persons if they act **before the debenture-holders take steps to enforce their security** (*k*).

(1) A landlord who distrains for rent (*Re Roundwood Colliery Co.*, [1897] 1 Ch. 373).

(2) A creditor who gets a garnishee order absolute (*Robson* v. *Smith*, [1895] 2 Ch. 124); (*l*)

(3) A judgment creditor if the goods are seized and sold by the sheriff before the debenture-holder takes steps (*m*).

But if the goods are not **sold**, the floating charge has priority.

Davy & Co. v. Williamson & Sons, [1898] 2 Q. B. 194.

The debentures created a floating charge. Goods of the company were seized by the sheriff under a *fi. fa.* Then the

(*h*) *Governments Stock Co.* v. *Manila Railway Co.*, [1897] A. C. 81.

(*i*) *Ind Coope & Co., Ld.*, [1911] 2 Ch. 223. But otherwise if the land is specifically charged.

(*j*) *Re Borax Co.*, [1901] 1 Ch. 326; but as to such a sale, see *Bisgood* v. *Henderson's Transvaal, Limited*, [1908] 1 Ch. 743.

(*k*) A mere demand for payment is not sufficient to crystallise the charge. *Evans* v. *Rival Granite Quarries, Ld.*, [1910] 2 K. B. 979.

(*l*) But not a garnishee order *nisi* (*Norton* v. *Yates*, [1905] W. N. 175.

(*m*) *Evans* v. *Rival Granite Quarries*, [1910] 2 K. B. at p. 987.

debenture holders for the first time took steps to enforce their security, and claimed priority:—**Held,** the debentures have priority: the debentures being a valid charge, the company had no interest in the property available to satisfy a judgment debt. Seizure of goods by the sheriff is not a dealing with the assets in the ordinary way of business.

(Note that, when the goods are **sold** under the *fi. fa.* they become the property of the purchaser.)

Rates and taxes and wages due to a clerk or servant or other person entitled to preferential payment on a winding-up, also have priority over debentures which create only a floating charge (*n*).

A floating charge created within three months of a winding-up is void in certain cases. See p. 269.

A person who has supplied goods to the company under a hire purchase agreement on the terms that they are to remain the property of the lender until paid for in full, has priority over the debentures (*o*).

A clause is frequently inserted in the debentures that the company shall not be able to create mortgages in priority to or *pari passu* with the debentures of that issue; but even then a person who takes a mortgage without notice of the debenture gets priority, even by an equitable mortgage by deposit to a person who has no notice of this provision in the debenture.

Re Valletort Steam Laundry, [1903] 2 Ch. 654.

The debentures created a floating charge, and contained a provision that the company were not to create any prior charge.

(*n*) Companies Act, ss. 107 and 209.

(*o*) *Re Morrison, Jones & Taylor, Ld.*, [1914] 1 Ch. 50. In this case the hire purchase agreement was made before the debentures were issued; but the person who supplied the chattels would probably have the same priority if the hire purchase agreement were made after the issue of the debentures, unless the chattels became fixtures and the debentures contained a specific charge on the land. Cf. *Wilson* v. *Kelland*, [1910] 2 Ch. 306.

The manager forgot this, and deposited deeds with a bank as security. The bank held some of these debentures on deposit for a customer:—**Held**—

(1) The bank had not constructive notice of the debentures;
(2) The bank had priority (*p*).

Where the company buys land and some of the purchase money is allowed to remain on mortgage (*q*) or is lent by some person who takes a charge (*r*), the charge of the debenture-holders is subject to the charge in favour of the seller or lender.

An express power to create mortgages ranking in priority to a floating charge does not authorise the issue of a new floating charge in priority to the first (*s*).

In case a debenture-holder owes a debt to the company which cannot pay its debentures in full, he cannot **set off** his debt against the debenture. The rule is that a person claiming a share of a fund must first pay up everything he owes to the fund (*Re Brown & Gregory, Ld.*, [1904] 1 Ch. 627; *Re Goy & Co., Ld.*, [1900] 2 Ch. 149).

The equitable rules against clogging the equity of redemption may apply to a floating charge (*t*).

As to conditions 3 and 8.—The effect of these clauses is that the company **may** disregard any notice of equities attaching to the debentures.

Société Generale v. Walker (1885), 11 App. Cas. at p. 30.

The Articles contained a clause similar to conditions 3 and 8 above:—**Held,** "there was no obligation on this company to accept or to preserve any record of notices of equitable interests

(*p*) And see *Cox-Moore* v. *Peruvian Corporation*, [1908] 1 Ch. 605.
(*q*) *Willson* v. *Kelland*, [1910] 2 Ch. 306.
(*r*) *Re Connolly Brothers, Ld.* (No. 2), [1912] 2 Ch. 25.
(*s*) *Benjamin Cope & Sons, Ld.*, [1914] 1 Ch. 800.
(*t*) *G. and C. Kreglinger* v. *New Patagonia Meat Co., Ld.*, [1914] A. C. at p. 41; but see *De Beers Mines* v. *British South Africa Co.*, [1912] A. C. 52, and *Cuban Land and Development Co.*, [1921] 2 Ch. 147.

or trusts if actually given or tendered to them, and that any such notice if given would be absolutely inoperative to affect the company with any trust."

But the company **need not** disregard equities, and if the company has equitable claims against the debenture-holder, it may refuse to register the transfer (*Re Palmer's Decorating and Furnishing Co.*, [1904] 2 Ch. 743).

If a condition to this effect was not inserted, a debenture, being a chose in action, would be assignable subject to all equities.

Athenæum Society v. Pooley (1858), 3 De G. & J. 294.

Debentures were issued to P. under an agreement which was a fraud on the company. P. sold them to L., who had no notice of these facts:—**Held**, L., though a *bonâ fide* purchaser for value without notice, being only a purchaser of a chose of action, mus take it subject to the equities attaching to it. Therefore L. cannot sue on the debentures (*x*).

As to condition 5 (p. 153).—The object of requiring all transfers to be delivered to the company, is to secure that the company shall have all the relevant documents in its possession in case of a dispute as to the title to any debentures.

As to condition 10 (p. 154).—The effect is that if there is undue delay in payment of the interest or if the security becomes endangered, the debenture-holder can immediately take proceedings to recover his money.

As to condition 11.—A demand for payment at the place specified in this condition is not necessary before proceedings are commenced (*y*).

As to condition 14.—The debenture-holders can

(*x*) This was before the Judicature Act, 1875 (36 & 37 Vict. c. 66), s. 25 (6), but choses in action are assignable subject to equities under that Act; and see *Re Rhodesia Goldfields, Limited*, [1910] 1 Ch. 239.

(*y*) *Harris Calculating Machine Co.*, [1914] W. N. 133.

always get a receiver appointed by the court if a proper case has arisen, whether or not this clause is inserted. The object of the clause is to enable them to appoint a receiver themselves without applying to the court. (See section 8, p. 178.)

As to condition 15 (p. 155). The advantages of having a trust deed are:

(1) If the company makes default, the trustees are there, ready to take the necessary steps, instead of leaving it to the initiative of some debenture-holder.

(2) The trustees may be given power to sell and thus to realise the security without the aid of the court.

(3) The legal estate is vested in the trustees. This prevents a subsequent legal mortgagee from getting priority.

(4) The company can be made to insure, etc., by covenants in the deed.

Form of the deed (*a*).—The deed usually contains the following provisions:—

(1) Conveyance of freeholds and leaseholds, etc., to the trustees.

After the commencement of the Law of Property Act, 1922, these will be demised to the trustees for long terms of years.

(2) A floating charge over the rest of the assets of the company.

(3) The company is to retain possession until it makes default in payment of interest, etc.; then the trustees are to enter and sell.

(4) Power to the trustees to sell or exchange any of

(*a*) As to the stamp on a debenture trust deed, see *Suffield* v. *Inland Revenue Commissioners*, [1908] 1 K. B. 865.

the above-mentioned properties of the company at the request of the company.

(5) Power to the trustees to convene meetings of debenture-holders, etc.

(6) Covenants by the company to insure, repair, etc.

(7) Provisions for remuneration of the trustees.

As to (1).—This makes the trustees *specific* mortgagees of the freeholds and leaseholds, and these cannot be sold or dealt with without the trustees' consent.

As to (5).—Debentures sometimes contain a clause that the rights of the debenture-holders may be modified with the consent of a majority of (say) three-fourths of them, and that this consent shall bind all the debenture-holders (*Sneath* v. *Valley Gold Co.*, [1893] 1 Ch. 477). The modification may provide for postponement of payment of principal or interest (*b*) or for any other alteration of the rights of the debenture-holders, provided it is not unfair or oppressive (*c*).

As to (7).—The remuneration of the trustees is usually a first charge on the assets (*d*); it usually continues to be payable "during the continuance of the security"; but it is better to add "notwithstanding the appointment of a receiver" (*e*).

SECTION 3.

Debentures to Bearer.

The object of making a debenture payable to bearer is that it may become a negotiable instrument, that is to say:

(1) It is transferable by delivery.

(2) A transferee in due course gets a title independent of any defects in the title of the transferor.

(*b*) *Northern Assurance Co., Ld.* v. *Farnham Breweries*, [1912] 2 Ch. 125, where redeemable debentures were made "irredeemable."

(*c*) *Goodfellow* v. *Nelson Line, Ld.*, [1912] 2 Ch. 324 (alteration upheld). *New York Taxi-Cab Co.*, [1913] 1 Ch. 1 (alteration held invalid).

(*d*) *Re Piccadilly Hotel*, [1911] 2 Ch. 534.

(*e*) See *British Consolidated Oil Co., Ld.*, [1919] W. N. 102, not following *Re Locke & Smith*, [1914] W. N. 118.

(3) No notice of transfers need be given to the company.

(4) No stamp duty is payable on a transfer.

As in the case of share warrants, the interest is payable to the bearer of a coupon, which is merely an order on the company or the company's bank to pay a certain sum to the person who presents it on or after a certain date. Several coupons are attached to each debenture and are cut off by the holder one by one as the date for payment of each arrives.

Form of debentures to bearer.—The form is much the same as the form of a debenture to registered holder (on p. 152), except that the agreement is to pay "to the bearer on presentation of this debenture" and to pay interest "in accordance with the coupons annexed hereto."

The conditions indorsed on the debenture contain some of the same clauses, but omit all reference to a register or registered holder, and also contain the following clauses:

(1) Interest shall be payable only to the person producing the coupon.

(2) When the principal sum due is paid off, the debenture and coupons must be surrendered.

(3) The company may safely pay interest to the bearer of the coupon.

(4) Notice affecting the holders (*e.g.*, of intention to pay off) may be given by advertisement.

(5) The debenture is to be treated as negotiable.

(6) On the request of the holder, the company will exchange his debenture for a debenture to registered holder.

Debentures payable to bearer are negotiable.—There was at one time some doubt as to this, for at common law an instrument **under seal** could not be

negotiable (*Crouch* v. *Credit Foncier* (1873), L. R. 8 Q. B. 374). But it was held that in the case of a **foreign** instrument under seal, if it was treated by the general custom of merchants as being negotiable, it would be recognised as such by English law (*Goodwin* v. *Robarts* (1875), L. R. 10 Ex. 337). It is now settled that the latter doctrine applies also to English documents even though under seal.

Bechuanaland Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658.

The plaintiffs held debentures of an English company, payable to bearer and under the seal of the company. The plaintiffs kept them in a safe of which their secretary had the key. The secretary pledged the debentures with the defendant bank as security for a loan. The bank took them *bonâ fide*, having recently received from the plaintiffs an assurance that their secretary was absolutely trustworthy :—**Held,** the debentures are negotiable. The defendants have a good title.

Bearer debentures are now recognised as negotiable without the necessity of proving a custom of merchants to treat them as such.

Edelstein v. Schuler, [1902] 2 K. B. 144.

Debenture bonds, payable to bearer, were stolen and sold through a broker :—**Held** (BIGHAM, J.), "The time has passed when the negotiability of bearer bonds, whether government bonds or trading bonds, foreign or English, can be called in question. The existence of the usage has been so often proved that it must be taken to be part of the law."

SECTION 4.

Registration of Debentures.

Debentures or other mortgages made by limited companies need not be registered as bills of sale, even if they include chattels, for, by the Bills of Sale Act, 1882, s. 17, debentures of "any **mortgage, loan,**

or other incorporated company" (*f*) need not be registered.

Re Standard Manufacturing Co., [1891] 1 Ch. 627.

It was argued that the debentures of a company must be registered as bills of sale, unless it was a mortgage or loan company or some similar company, *i.e.* that the words "other company" must be construed *ejusdem generis*:—**Held**, the section applies to *all* incorporated companies.

The reason is that sufficient provision is made in the Companies Act for the registration of debentures.

Debentures or mortgages made by companies need not be registered as land charges under the Law of Property Act, 1922 (*ff*)

Debentures created after the 1st of January, 1901, **must be registered under the Companies Act.**

By sect. 93 every mortgage or charge created by the company (*g*)

(a) for securing an issue of debentures; **or**

(b) charged on uncalled capital; **or**

(c) by an instrument which if made by an individual would require registration as a bill of sale; **or**

(d) which creates a floating charge (*h*); **or**

(e) is a mortgage or charge on land (*i*); **or**

(f) is a mortgage of book debts,

(*f*) This includes a company registered in Guernsey (*Clark* v. *Balm, Hill & Co.*, [1908] 1 K. B. 667).

(*ff*) Sched. VII. 1 (6).

(*g*) If created between January 1st, 1901, and July 1st, 1908, the Act of 1900 applies, which includes only (a), (b), (c), and (d) above. If created after July 1st, 1908, (e) and (f) also apply.

(*h*) *E.g.* a trust deed to secure a bonus on debenture stock, charged on certain profits. *Hoare* v. *British Columbia Co.*, [1912] W. N. 235.

(*i*) A deposit of title deeds, or any other equitable or implied charge should be registered. Thus, if a solicitor claims a lien over the deeds of a company for his costs his lien should be registered. So also a contract for sale of land to a company should be registered if the vendor wishes to rely on his lien for unpaid purchase-money.

shall so far as it creates a charge be void (*j*) as against the liquidator and creditors of the company, **unless it be delivered for registration with the registrar within twenty-one days** of its **creation.**

Besides the register kept by the registrar the company must:

(1) keep a register of mortgages and charges specifically affecting property of the company (sect. 100);

(2) keep copies of all mortgages and charges which have to be registered with the registrar (sect. 93 (9)).

The company usually keeps a register of debenture-holders; but it is not bound to do so.

In case of a series of debentures the register states—

(a) the total amount secured;

(b) dates of resolutions and deeds (if any) which created the charge;

(c) description of the property charged; and

(d) names of the trustees (if any) (sect. 93 (3)).

Right of Inspection.

(1) The register kept by the registrar must be open to the inspection of any one on payment of not more than 1s. (*k*).

(2) The register of mortgages kept by the company must be open to creditors and members of the company free, and to other persons on payment of not more than 1s. (*l*).

(3) The copies of mortgages registered with the registrar must be open to creditors and members free, but not to other persons (*l*).

(4) The register of debenture-holders (if any) must be open to

(*j*) See as to the effect of this *Dublin City Distillery* v. *Doherty*, [1914] A. C. 823.

(*k*) Companies Act, s. 93 (8). (*l*) *Ibid.* s. 101 (1).

registered debenture-holders and members of the company subject to any reasonable restrictions (*m*).

Shareholders and debenture-holders are also entitled to require a copy of the register of debenture-holders at 6*d*. per 100 words (*m*), and debenture-holders are entitled to require copies of the debenture trust deed, if any, for 1s. if printed, or if not at 6*d*. per 100 words (*n*).

Effect of Non-Registration.—If a mortgage or charge is not registered with the registrar, it is **void** as to the security, but the obligation to pay the debt remains.

A new mortgage made under the terms of a debenture trust deed which does not increase the total amount secured, need not be registered.

Bristol Breweries, Limited v. **Abbot,** [1908] 1 Ch. 279.

Similarly, separate mortgages of ships to trustees for debenture-holders need not be registered.

Cunard S.S. Co. v. Hopwood, [1908] 2 Ch. 564.

The certificate of registration given by the registrar is conclusive.

Re Yollond, Limited, [1908] 1 Ch. 152.

The date when the charge or debentures are "**created**" seems to mean the date when the instrument was executed (*o*); but in the case of debentures not until some of the series have been issued.

Re Spiral Globe, Limited (No. 2), [1902] 2 Ch. 209.

August, 1900, the company resolved to issue 20 debentures and sealed them. September 24th, 1900, 10 debentures were issued to debenture-holders. January, 1901, the other 10 were issued:—**Held,** the whole issue should have been registered within 21 days after September 24th, 1900.

But where the trust deed was dated before 1901

(*m*) Companies Act, s. 102. (*n*) *Ibid.*, s. 102 (2).
(*o*) *Esberger* v. *Capital & Counties Bank,* [1913] 2 Ch. 366.

and the debentures were issued after 1901, registration was held not to be required (*p*).

An agreement to issue debentures usually creates an equitable charge at once.

(1) If so, the agreement should be registered within 21 days (*pp*).

(2) If not, *i.e.*, if it is merely an agreement to give a charge in the future, it need not be registered (*q*).

But such a transaction is open to suspicion (*Re Jackson and Bassford*, [1906] 2 Ch. 467); and if the charge is created within 3 months before the winding-up, it may be void as a fraudulent preference (see p. 268) or under sect. 212 (see p. 269).

If debentures are not registered within the proper time, a judge may order the **time for registration to be extended,** provided the default is accidental or due to inadvertence or some other sufficient cause or not such as to prejudice the position of creditors or shareholders, or on any other grounds which may be just and equitable (*r*).

The necessity for an application to the court can generally be avoided by cancelling debentures which have been issued without proper registration, and issuing new ones in their place (see *Defries & Co., Limited*, [1904] 1 Ch. 40). But there is the risk that such debentures may be void if the company is wound up within 3 months.

This relief was first given by sect. 15 of the Act of 1900. The section was repealed by the Acts of 1908, and replaced by sect. 96, which, however, refers only to registration of debentures created after the 1st of July, 1908, and gives no remedy for failure to register debentures created before that date.

(*p*) *Dublin Distillery* v. *Doherty*, [1914] A. C. 823.

(*pp*) The registration of a series of debentures may protect documents of the same series which owing to some technical defect can only be upheld as agreements for debentures. See *Fire Proof Doors, Ltd.*, [1916] 2 Ch. 142.

(*q*) *Gregory, Love & Co., Ld.*, [1916] 1 Ch. 203.

(*r*) Companies Act, s. 96.

The remedy given by the earlier section, however, still remains by reason of the Interpretation Act, 1889, which says that the repeal of an Act shall not affect rights or remedies acquired before the Act was repealed (*s*).

The order must be made "without prejudice to the rights of parties acquired prior to the time of actual registration."

Re Spiral Globe, Limited, [1902] 1 Ch. 396 (*t*).

The effect of such a clause is not so great as appears at first sight; for an ordinary unsecured creditor does not "acquire any rights" against the property of the company until the company commences to be wound up.

Thus—

(1) If the debentures are registered before a winding-up has commenced, the debenture-holders have priority over the unsecured creditors (*u*) (*Re Ehrmann Bros., Limited,* [1906] 2 Ch. 697).

(2) If the debentures are registered after a winding-up has commenced, the unsecured creditors rank equally with the debenture-holders (*Re Anglo-Oriental Carpet Co.,* [1903] 1 Ch. 914).

But a subsequent incumbrancer, even *with notice,* has priority if registered before the date of the order.

Monolithic Building Co., [1915] 1 Ch. 643.

The application may be made either by summons or by motion in the Chancery Division.

(*s*) *Herts & Essex Waterworks, Ld.,* [1909] W. N. 48; *Lush & Co., Ld.,* [1913] W. N. 39.

(*t*) And see *Re I. C. Johnson & Co., Limited,* [1902] 2 Ch. 101.

(*u*) If, therefore, the position of the unsecured creditors is likely to be seriously affected, they should have an opportunity of being heard before the order is made (*Cardiff Workmen's Cottage Co., Limited,* [1906] 2 Ch. 627). The consent of the principal creditor was required in *Herts & Essex Waterworks, Limited,* [1909] W. N. 48.

SECTION 5.

Transfer of Debentures.

Debentures to bearer are transferred by simple delivery.

Debentures to registered holder are transferred in the manner specified in the conditions indorsed thereon.

The form is generally similar to a transfer of shares (see p. 101, *ante*). If no form is specified, they may be assigned, like any other chose in action, by writing signed, with written notice to the company.

Debentures are transferable, unless the contrary is agreed, subject to all equities, *e.g.*, after a resolution to wind up the company a shareholder can only assign his debentures subject to his liability for calls due on his shares.

Re China Steamship Co. (1869), L. R. 7 Eq. 240.

Low held sixty shares in the company, and five debentures. The company was wound up, and Low assigned his debentures to M. Later, calls were made on the sixty shares:—**Held**, M. took the debentures subject to the company's claim for calls. And see *Athenæum Society* v. *Pooley* (1858), 3 De G. & J. 294 (see p. 162).

But this is not so if the debentures are negotiable (see p. 165, *ante*), or if the debtor company has precluded itself from setting up such equities.

Re Goy & Co., [1900] 2 Ch. 154.

The debentures contained a clause that the principal and interest would be paid to any transferee without regard to the equities between the company and the transferor. A resolution

was passed to wind up the company. C., a director, then transferred his debentures to R. C. had been guilty of misfeasance towards the company, but R. did not know this:—**Held,** R. takes, free from the company's claim against C.

But where the assignee is only a trustee for the assignor or his creditors, the company can enforce the equities against the transferee.

Re Brown and Gregory, Limited, [1904] 1 Ch. 627.

S. & Co. owed £1666 to the company, but held debentures in the company. S. & Co. assigned all their property, including the debentures, to P. in trust for their creditors:—**Held,** P. takes the debentures subject to the company's right to insist on payment of the debt of £1666 before paying the debt due from them and secured by the debentures.

A company can become a transferee of its own debentures (*y*).

Debentures which have been transferred to the company or to nominees for the company, or which have been otherwise kept alive after being paid off, may be re-issued (*z*), so as to rank *pari passu* with the original issue, unless (1) the articles provide otherwise, or (2) the company is under a contract to redeem the debentures (*a*).

Where there is such a contract, redeemed debentures cannot be re-issued (*b*).

(*y*) *Re George Routledge & Sons,* [1904] W. N. 157.

(*z*) As to the effect of the re-issue on registration of the debentures see *Re New Omnibus Co.,* [1908] 1 Ch. 621. A transfer of a debenture which had been issued under a contract to re-issue the debenture every 14 days, although it apparently avoided the necessity for registration, was held valid, as against the company, in favour of a *bonâ fide* holder for value without notice in *Re Renshaw & Co.,* [1908] W. N. 210.

(*a*) Companies Act, s. 104.

(*b*) *Re Russian Petroleum Co.,* [1907] 2 Ch. 540.

SECTION 6.

Issue of Debentures (*c*).

Debentures (unlike shares) **may be issued at a discount,** if this is allowed by the Articles of the company.

The reason is that they **do not form part of the capital of the company.**

Thus, suppose a company has tried to issue several £100 debentures with interest at four per cent., but they are not taken up; there would be nothing to prevent the company issuing other debentures at five per cent.; but nearly the same result is obtained by issuing each of the old £100 debentures for £80. The company will then have to pay £4 annually on each £80 lent, which amounts to £5 per cent. Besides this there is the gradual increase in the value of the debentures. Thus if they are to be paid in twenty years, the capital value should increase by about £1 per year, thus in effect further increasing the rate of interest.

Re Regent's Canal Co. (1876), 3 Ch. D. 43.

The company issued 100 debentures of £100 each at £95 each. Forty of these were deposited with creditors as security:—**Held,** this was a good charge. The validity of the issue was not disputed (*d*).

On winding-up, the company's power to issue debentures ceases. But the company can allot the rest of a series already issued at any time before winding-up, even after an action has been commenced by debenture-holders to enforce their security.

Hubbard & Co., W. N. (1898) 158.

Some of the debentures of an issue were not taken up. The interest fell in arrear. The debenture-holders commenced an action for a receiver. The company allotted some of the remaining debentures of the series to its solicitor as security for the costs of the defence:—**Held,** the issue was good, as the receiver had not yet been appointed.

(*c*) For the meaning of the term "issue" of debentures, see *Perth Electric Tramways, Limited,* [1906] 2 Ch. 216, at p. 219.

(*d*) And see *Mosely* v. *Koffyfontein Mines,* [1904] 2 Ch. 108.

If money is advanced to the company under an agreement that debentures shall be issued, this creates a charge at once in equity.

Pegge v. Neath, etc., Co., [1898] 1 Ch. 183.

The company borrowed money from P. and gave him a promissory note, and undertook to issue to P., when called on, second mortgage debentures to that amount. An action was brought by the first and some of the second debenture-holders to enforce their security, and they obtained judgment. Then P. claimed to have his second debentures issued to him:—**Held,** P. was in equity a holder of second mortgage debentures to the amount of his debt.

A debenture issued in an irregular manner may be treated as an agreement to give a debenture (*dd*).

Specific performance of an agreement to give debentures may be enforced against a company: and the company can specifically enforce against another person an agreement to take debentures (*e*).

Before the Act of 1907 the latter agreement could not be specifically enforced.

South African Territories, Limited v. Wallington, [1898] A. C. 309.

The company issued a prospectus for 1500 debentures of £50 each, payable as to ten per cent. on application, and the rest by instalments. W. signed an application form for sixteen debentures, and paid £80, and thereby agreed to take sixteen debentures on the terms of the prospectus. The company allotted the debentures, but W. refused to pay anything further. The company claimed (1) specific performance; (2) damages:—**Held** (Lord HALSBURY), "The real nature of the transaction is an agreement by the applicant to lend money at certain interest." You cannot

(*dd*) *Re Fireproof Doors Ltd.*, [1916] 2 Ch. 142. An agreement to give a future contingent charge does not operate as an agreement to give a debenture. *Gregory, Love & Co.*, [1916] 1 Ch. 203.

(*e*) Companies Act, s. 105. But not if the company has forfeited the debentures for non-payment of instalments. *Kuala Pahi Rubber Estates* v. *Mowbray*, [1914] W. N. 321.

get specific performance of a contract to lend money. But an action for damages for breach of contract will lie.

SECTION 7.

Remedies of Debenture-holders.

A debenture-holder who wishes to realise his security and get his money back, may make use of all or any of the following remedies.

1. He may sue on behalf of himself and all other debenture-holders to obtain payment or to **enforce his security by sale.** The court then appoints a receiver and (if necessary) a manager (see p. 183), and declares the debentures to be a charge on the assets of the company, directs inquiries as to who are debenture-holders, etc., and orders a sale of the property (*f*).

The holder of one of a series of debentures cannot sell the property charged unless the debentures contain an express power of sale. *Blaker* v. *Herts and Essex Waterworks* (1889), 41 Ch. D. 406.

Any surplus of the proceeds of sale after payment of the principal, interest and costs due to debenture-holders is payable to the company (*g*).

2. He may **appoint a receiver,** if the conditions give him power to do so (see section 8, p. 178, *post*).

3. The debenture-holder may apply to the court for **foreclosure,** which may extend even to the uncalled

(*f*) **Note as to procedure.**—The company frequently consents to such an application; if so, an order is first made appointing a receiver, and later a sale is ordered on a motion for judgment (see *Crigglestone Coal Co.*, [1906] W. N. 20). For this purpose a statement of claim should be prepared (*Re Dupont*, [1906] W. N. 14), and should be supported by evidence. The statement of claim can only be dispensed with if the company consents to the order. (*Re Kitson Empire Co.*, [1910] W. N. 154). For the form of the order, see *Crigglestone Coal Co.* (*ubi sup.*), and *re Addressograph*, [1909] W. N. 260.

(*g*) As to the order of payment, see *Calgary & Medicine Hat Co.*, [1908] 2 Ch. 652.

capital of the company (*Sadler* v. *Worley*, [1894] 2 Ch. 170).

But this remedy is not usual, as it is necessary for all the debenture-holders of every class to be parties to the action.

Elias v. Continental Co., [1897] 1 Ch. 511.

Four out of five debenture-holders sued for foreclosure:— **Held**, where the legal estate is in the mortgagees and foreclosure means simply depriving the mortgagor of his equity of redemption, it is not necessary for all parties to be present: but where it involves **conveying the property of the company to the mortgagees**, they must all be present.

4. He can present a petition for winding up the company, as he is a creditor for the amount of his principal and interest (see p. 241) but not for any premium paid on redemption, unless the debenture expressly so provides (*h*).

5. He may have the property sold, if the debenture trust deed gives the trustees a power of sale.

6. If the company be insolvent, and his security is insufficient, he may value his security and sue for the balance of his debt or give up his security and sue for the whole debt.

The proceeds recovered by enforcing his security may be applied by the debenture-holder in payment of his costs, principal debt and interest, up to date of payment (*i*). But if his security is insufficient, and the company is insolvent, he cannot prove for interest which became due after winding up; nor can he get interest out of his security when arriving at a balance for which he can prove in the winding up (*j*).

(*h*) *Re Simmer & Jack East*, [1913] W. N. 41.
(*i*) *Wallace* v. *Universal Automatic Co.*, [1894] 2 Ch. 555.
(*j*) *Quartermaine's Case*, [1892] 1 Ch. 639. and see p. 267, *post*.

A plaintiff who sues on behalf of himself and all other debenture-holders of the same class, has a first claim against the proceeds for his costs.

A second debenture-holder who is made a party gets his costs only out of the surplus (if any) after payment of the first debentures (*k*).

The amount of costs that he may recover depends on a rule at first sight rather curious.

(1) If the assets are **insufficient** to pay the debentures of his class in full, he gets solicitor and client costs.

(2) If the assets are sufficient to pay the debentures of his class in full, but not sufficient to pay the subsequent debentures, he only gets party and party costs (*l*).

The reason of this is that in the first case the costs come entirely out of the pockets of the persons whose right he has been enforcing; while in the second, they come out of the residue of the fund which is going to persons not benefited by his exertions (*m*).

SECTION 8.

Receivers (*n*).

A debenture-holder can appoint a receiver under the express power in his debenture (see condition 14 on p. 154, *ante*), or he can apply to the court.

(*k*) *Re Clayton Engineering Co.*, [1904] W. N. 28, except in special cases where he has rendered valuable services to the debenture-holders as a whole.

(*l*) But if the plaintiff cannot pay to his solicitor the difference between party and party costs and solicitor and client costs, the solicitor has a lien on the property recovered in the action for the difference (*Re W. C. Horne & Sons, Limited*, [1906] 1 Ch. 271; and see form of order on p. 277).

(*m*) *New Zealand Midland Rail. Co.*, [1901] 2 Ch. 357; and see *Re Clayton Engineering Co.*, [1904] W. N. 28.

(*n*) See generally Riviere on Receivers and Managers.

The advantage of getting a receiver **appointed by the court** is that **any interference with him is a contempt of court**, and no proceedings can be commenced against him or in respect of the property in his hands without leave of the court (*o*).

Re Metropolitan Amalgamated Estates, Ltd.,
[1912] 2 Ch. 497.

The company made a specific first mortgage of leaseholds. Later the company issued debentures charged on all its assets.

1st Feb. 1912. The mortgagee appointed a receiver under his mortgage deed, but did not give notice to the tenants of the leaseholds.

2nd Feb. A debenture-holder obtained the appointment of a receiver by the court.

The mortgagee was not a party to the action.

8th Feb. The mortgagee gave notice to the tenants of the appointment of his receiver.

27th Feb. The mortgagee gave notice of a motion to the court for leave to take the rents notwithstanding the appointment of the debenture-holder's receiver.

Rents were paid to the receiver between the 2nd Feb. and the 27th Feb. :—**Held,** these rents were properly paid to the receiver on behalf of the debenture-holder.

(*Note.*—When a receiver is appointed on the application of a second mortgagee, the order is usually made "without prejudice to the rights of prior incumbrancers." If these words had been added to the order in the above-stated case, the mortgagee would have been entitled to take the rents without applying to the court. *Underhay v. Read*, 20 Q. B. D. 209.)

One advantage of appointing a receiver under the powers given by the debenture is that he is in a better position if the company is wound up and a liquidator appointed.

(*o*) No proceedings can be taken against the receiver in any other action. *Re Maidstone Palace, Ld.*, [1909] 2 Ch. 283. As to proceedings by the debenture-holder against the company, see *Cleary* v. *Brazil Railway*, [1915] W. N. 178.

Henry Pound, Son & Hutchins (1889), 42 Ch. D. 402.

Debenture-holders were allowed to appoint a receiver (under a clause similar to clause 14 on p. 154) to take possession, although a liquidator had already been appointed.

But where a receiver has been appointed by the court, the court will usually put the liquidator in his place to act as both receiver and liquidator (*Re Joshua Stubbs, Limited*, [1891] 1 Ch. 475); but see *Re Karamelli and Barnett, Limited*, [1917] 1 Ch. 203. The court will sometimes replace a receiver appointed by one debenture-holder by a receiver appointed by the court; *Re Slogger Automatic Co.*, [1915] 1 Ch. 478.

A receiver appointed by the debenture-holders under a power in the debenture **is the agent of the debenture-holders**, and they are therefore liable on his contracts, unless the power to appoint a receiver expressly states that he is to be the agent of the company. (*Robinson Printing Co.* v. *Chic, Limited*, [1905] 2 Ch. 123.)

Note that in this respect he differs from a receiver appointed by an ordinary mortgagee under the Conveyancing Act, s. 19, for such a receiver is expressly declared by sect. 24 of the Act to be the agent of the mortgagor, and for this reason the receiver should be expressly declared to be the agent of the company by the conditions on the debenture (see condition 14 on p. 154).

A condition which merely incorporates sect. 24 of the Act has been held not to be sufficient for the purpose. (*Deyes* v. *Wood*, [1911] 1 K. B. 806.)

On a winding up the receiver ceases to be the agent of the company, but he does not thereby become the agent of the debenture-holders. (*Gosling* v. *Gaskell*, [1897] A. C. 575.)

In either case he is not personally liable on contracts which he makes (*p*).

A receiver appointed by the court is the agent

(*p*) *Gosling* v. *Gaskell*, [1897] A. C. 575.

of the court, and, as the court cannot be liable, the receiver becomes liable personally on his contracts. He is, however, entitled to be indemnified out of the assets of the company in priority to the rights of the debenture-holders (*q*).

A receiver appointed by the court is considered to have been appointed for the benefit of all persons interested in the assets.

He must not break contracts merely because he thinks this will suit the debenture-holders (*r*); but he is not bound to borrow money to perform contracts which can only be completed at a loss (*s*).

If the court has ordered the receiver to take proceedings, the plaintiff has no right to stop such proceedings, the question being in the discretion of the court (*t*).

The receiver cannot create a lien in favour of certain creditors without leave of the court (*x*).

A receiver may be appointed by the court in a "debenture-holders' action" (commenced by one debenture-holder on behalf of himself and all the others);

(1) If the principal money has become payable under condition 10 (see p. 154).

Even if the money became due after the writ was issued (*Re Carshalton Estate, Limited*, [1908] 2 Ch. 62).

or (2) If the Company is wound up, even though the money is not expressly made payable in that event (*y*).

or (3) **If the security is in jeopardy**, even if there

(*q*) *Burt* v. *Bull*, [1895] 1 Q. B, 276; and *Re Glasdir Copper Mines, Limited*, [1905] W. N. 172; and *London United Breweries, Limited*, [1907] 2 Ch. 511.
(*r*) *Newdigate Colliery, Ld.*, [1912] 1 Ch. 468.
(*s*) *Re Thames Ironworks, Ld.*, [1912] W. N. 66.
(*t*) *Viola* v. *Anglo-American Co.*, [1912] 2 Ch. 305.
(*x*) *Moss Steamship Co.* v. *Whinney*, [1912] A. C. 254.
(*y*) And even if the winding up is for the purpose of re-construction only. *Re Crompton & Co., Ld.*, [1914] W. N. 100.

has been no default in payment of interest, and no winding up.

E.g., if a judgment creditor has levied execution (*z*), or if a judgment remains unsatisfied (*a*), or if the company has closed down its business or even one of its chief branches (*aa*), or if the company proposes to distribute its reserve fund among its members by way of dividend leaving the debentures insufficiently secured (*b*).

McMahon v. North Kent Iron Works, [1891] 2 Ch. 148.

The works had been closed and the men discharged. The company was wholly insolvent; but no case had arisen under condition 10. A receiver was appointed.

Mere insufficiency of the security does not amount to jeopardy (*c*).

If there is no board of directors (*e.g.* if they are all "*alien enemies*") a receiver and manager may be appointed (*cc*).

The receiver, when appointed by the court, must give security for the safety of the assets in his hands. If the plaintiff debenture-holder wishes him to act at once (*i.e.*, before he finds security), the plaintiff must undertake to be responsible until he gives security. The appointment of a receiver must be notified to the registrar (*d*).

He must make the preferential payments (see p. 265) required to be made by sect. 107 of the Companies Act. If he fails to do this, he may be liable in damages (*e*).

The court may supersede a receiver appointed by a debenture-holder, if the appointment was not for the benefit of all the debenture-holders (*Re Maskelyne British Type-writer*, [1898] 1 Ch. 133).

If the company is being wound up by the court, the court may appoint the Official Receiver to be receiver (*f*).

(*z*) *Edwards* v. *Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574.
(*a*) *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576.
(*aa*) *Re Braunstein & Marjolaine, Ld.*, [1914] W. N. 335.
(*b*) *Tilt Cove Copper Co.*, [1913] 2 Ch. 588.
(*c*) *New York Taxi Co.*, [1913] 1 Ch. 1.
(*cc*) *Trade Auxiliary Co.* v. *Vickers*, L. R. 16 Eq. 303.
(*d*) Companies Act, s. 94. Penalty £5 per day.
(*e*) *Woods* v. *Winskill*, [1913] 2 Ch. 303.
(*f*) Companies Act, s. 162.

The court may also appoint a manager, if it is necessary.

On the appointment of a receiver, the assets become specifically charged in favour of the debenture-holders, and the power of the company to deal with them in the ordinary course of business ceases, although it continues to exist as a company until it is wound up (*g*).

If therefore it is necessary to carry on the business, the court usually appoints the receiver to be **receiver and manager.**

A manager is not generally appointed except to carry on the business for the purpose of selling it as a going concern; but this rule is not inflexible.

Re Victoria Steam Boats, [1897] 1 Ch. 158.

The company was formed to work passenger steamers on the Thames and also to carry on ferry work at Greenwich and Woolwich, under contracts with the Great Eastern Railway. The company was wound up and stopped the passenger service. The debenture-holders applied for a manager of the ferry business, on the ground that if the contracts were broken, there would be a heavy loss to the debenture-holders:—**Held,** the court has a discretion and will appoint a manager in this case, for though there is no immediate prospect of a sale, there will probably have to be a realisation some day.

If, however, there is no power to sell the business, a manager will not be appointed.

Marshall v. South Staffordshire Tramways, [1895] 2 Ch. 36.

A tramway company (under the Tramways Act, 1870) mortgaged all its undertaking:—**Held,** generally the owner of an equitable charge has a right to a judicial sale. "But this does not extend to . . . an undertaking which has been acquired under statutory powers for public purposes, if those purposes will be defeated or . . . seriously affected by a judicial sale." As there is no power of sale, a manager cannot be appointed.

(*g*) *Moss Steamship Co.* v. *Whinney,* [1912] A. C. 260; *Parsons* v. *Sovereign Bank,* [1913] A. C. 160.

A manager is appointed for a limited period, usually three months. If he acts after the expiration of this period without a further order, his expenses may be disallowed. (*Wood Green Laundry, Co. Ltd.*, [1918] 1 Ch. 423.)

The court may authorise the **receiver to borrow money** to be a first charge on the property of the company in priority to all the debentures, if it is required for the purpose of preserving the business.

Greenwood v. Algesiras Railway Coy., [1894] 2 Ch. 205.

The court allowed the receiver to borrow £10,000 for the repair of landslips on a Spanish railway; for if they had not been repaired, the Government would have declared the railway forfeited for discontinuance of traffic.

The claims of the persons who lend the money will then have priority over the claims of the debenture-holders (*h*), but will be postponed to the receiver's right of indemnity (*i*).

Leave to borrow money in this way will only be granted where there is clear evidence of advantage.

Securities Investment Corporation v. Brighton Alhambra (1893), 68 L. T. 249.

The receiver appointed by debenture-holders of a music hall had already borrowed £1000, and had carried on the business for some time at a loss. He applied for leave to borrow another £1000, in order to sell the business as a going concern:—**Held**, leave will not be granted, for this is a mere speculation.

If the receiver exceeds the amount authorised, his right of indemnity does not extend to the excess, even if he acted *bonâ fide*, unless it was reasonably necessary for him to borrow without applying to the court (*Re British Power, etc., Co., Limited*, [1906] 1 Ch. 497) (*k*).

(*h*) *Re Glasdir Copper Mines, Limited*, [1905] W. N. 172.

(*i*) *A. Boynton, Limited*, [1910] 1 Ch. 519. As to priorities where default is set off against indemnity see *Re British Power Traction Co.*, [1910] 2 Ch. 470.

(*k*) And S. C., [1907] W. N. 49 as to what was authorised in that case.

CHAPTER XIII.

UNDERWRITING.

An **underwriting agreement** is an "agreement whereby, previously to an offer of a company's shares to the public for subscription, some person undertakes, in consideration of a commission, to take the whole or a portion of such (if any) of the offered shares as may not be subscribed for by the public" (*a*).

Similar agreements may be made for underwriting debentures.

When a company offers a number of shares to the public, it is very often most important to secure that the whole issue shall be taken up. Even if the shares are almost certain to be taken, unforeseen events may happen, such as the outbreak of war or attacks against the company in the newspapers, which would endanger the success of the issue.

Consequently, a company is usually willing to pay a small commission on all the shares offered to the public to any one who will agree to take all the shares (if any) that the public do not take.

Brokerage is different. If the company agrees with A. that if he takes so many shares, the company will allow him a commission of £2 per cent., this may amount to issuing shares at a discount; but if A. is a

(*a*) Rawlins and Macnaghten, p. 220.

broker, and employed as such by the company for **placing** shares, a proper commission or "brokerage" may be paid.

A person who "**places**" shares does not take them himself, but finds other persons who will take them.

A reasonable brokerage has always been allowed.

Metropolitan Coal Association v. Scrimgeour,
[1895] 2 Q. B. 604.

A payment of two and a half per cent. to brokers was held to be valid.

Underwriting commission may only be paid under certain conditions. By section 89 of the Companies Act no company may apply any of its shares or capital, either directly or indirectly, in the **payment of any commission, discount or allowance** to any person in consideration of his subscribing or agreeing to subscribe for or procure subscriptions for any shares unless—

(1) the payment is a **commission**,

(2) the payment of the **commission is authorised in the articles**,

(3) the payment does not exceed the amount or rate authorised, and

(4) the amount or rate agreed to be paid is **disclosed in the prospectus** or statement in lieu of prospectus (*c*).

Sometimes the underwriter enters into subsidiary contracts with other persons to relieve him of some of his liability for a commission. This is called "sub-underwriting." The commission paid to sub-underwriters need not be disclosed in the prospectus (*d*).

(*c*) This section does not affect the power to pay brokerage, s. 89 (3).
(*d*) S. 81 (1) (h).

A sub-underwriter who gives an authority to apply for shares in his name cannot withdraw the authority (*dd*).

The result is that a company cannot apply its capital or shares in the payment of underwriting commission except in the manner mentioned in the Act.

This provision has been used as an indirect way of issuing shares at a discount.

Thus, the company agrees to pay to every person who subscribes for one £1 share the sum of 5*s*. by way of commission.

But the **rule against issuing shares at a discount still remains.**

Keatinge v. Paringa Mines, Ld., [1902] W. N. 15.

The company's £1 shares stood at 3*s*. in the market. The company proposed to issue 120,000 shares of £1 each on the terms that a bonus of 70% would be returned to each applicant, and also that a commission of 10% on the amount to be produced by the issue should be paid to certain guarantors:—**Held,** this was an issue of shares at a discount and was illegal.

There is a distinction between payment of a "commission" and "discount." The word "commission" seems to imply some service to the company beyond the mere agreement to take up shares in return for the company's agreement to allot them.

A person who takes up shares at a discount is liable to pay up the shares in full (*Re James Pitkin & Co., Ld.*, [1916] W. N. 112).

It was at one time thought that the Act prevented a company from giving, as the consideration for underwriting shares, an option to take further shares at par (*e*). This has now been held to be legal.

(*dd*) *Olympic Fire & General Co.*, [1920] 2 Ch. 341.

(*e*) Taking a share at "par" means, giving £100 for a £100 share. To give less, is to take at a **discount**; to give more, is to take at a **premium.**

Hilder v. Dexter, [1902] A. C. 474.

Shares were offered to fourteen persons on the terms that for each share taken up, the applicant should have an option of taking within a year one other share at par; and if he should take up this share within the year, then he should have a further option of taking up another share at par within the next year:—**Held,** this is valid. The company is not applying "any of its shares or capital," and is not paying "a commission, discount or allowance." The result is, in any case, that the company gets "par" for the shares.

Before the Act of 1907 the payment was only allowed on an offer of shares **to the public** (*f*).

The payment may be made direct by the company or by the person to whom the shares are allotted (*g*).

The contract usually takes the form of an underwriting letter, which may be either—

(1) An offer, which does not become binding until the company communicates its acceptance (*h*).

Ex parte Stark, [1897] 1 Ch. 575.

S., by letter, offered to subscribe or find securities for 10,000 shares, or so many as the company should agree to issue to him:—**Held,** this was merely an offer.

Or,

(2) An acceptance of the terms offered by the company.

Carmichael's Case, [1896] 2 Ch. 643.

C. signed a letter agreeing to take 1000 shares in consideration of a certain commission:—**Held,** this was a complete contract.

(*f*) See *Booth* v. *New Afrikander Co.*, [1903] 1 Ch. 295, and *Sherwell* v. *Combined Incandescent Syndicate, Limited*, [1907] W. N. 110, and notes thereto on p. 228.

(*g*) Companies Act, s. 89.

(*h*) And see *Ormerod's Case*, [1894] 2 Ch. 474, where the agreement was to take shares "if and when called upon."

Form of Underwriting Agreement (*i*).

The agreement usually contains the following terms—

(1) The underwriter agrees to underwrite a certain number of shares.

(2) All the shares are to be offered to the public on the terms of a specified prospectus (*k*).

(3) If the public do not take up all the shares, the underwriter is to take up the balance.

(4) The underwriter authorises the company to allot him such balance of shares.

(5) The company is to pay the underwriter a certain percentage of the nominal value of the shares underwritten.

The amount of commission paid in respect of shares and debentures must be stated in every prospectus and in the annual summary, and the rate of commission paid in respect of debentures must be entered in the register of mortgages kept by the registrar (*l*), and in every balance sheet of the company until the amount paid has been written off (*m*).

When **debentures** are underwritten, it is not necessary to disclose the underwriting in any prospectus or notice in lieu of prospectus under section 89; but, if a prospectus is issued, the underwriting must be disclosed, s. 81 (1) (h), and it must also be disclosed in the annual summary and balance sheet and particulars must be entered when the debenture is registered. Sect. 93 (4).

(*i*) See Palmer's Precedents, Part I. Chap. IV.

(*k*) If the terms of the prospectus are afterwards altered, the underwriting agreement may become void. *Warner International Co.* v. *Kilburn*, [1914] W. N. 60.

(*l*) Companies Act, s. 93 (4).

(*m*) Companies Act, s. 90.

CHAPTER XIV.

DIRECTORS.

Section 1.

Position of Directors.

A COMPANY need not have directors (*a*). All the members together might carry on the business, or there might be a "council"; but a company usually appoints a certain number to be managers of the business, to make contracts for the company, and to take care of the property of the company, and they are generally called directors. Thus, directors are sometimes said to be (1) **Trustees,** and sometimes (2) **Agents or managers.** Their exact position is hard to define.

(1) The directors are to some extent **trustees for the company.** Thus, the Statute of Limitations applies to their actions in the same way as to trustees.

Re Lands Allotment Co., [1894] 1 Ch. 616.

The company had no power to invest in shares of other companies. The directors invested £35,000 in shares of the Building Securities Co. in 1885. The company was wound up in 1893, *i.e.* more than six years later:—**Held,** the directors were protected under the Trustee Act, 1888, as there was no fraud (also they were not liable as the shares were taken in payment of a debt).

(*a*) Or the sole director may be a limited company (*Re Bulawayo Co.*, [1907] 2 Ch. 460).

Directors are trustees for the company of their power of approving transfers, issuing and allotting shares (*b*), and making calls.

Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56.

For facts, see p. 114 above.

LINDLEY, M.R.: "The Court of Chancery has always exacted from directors the observance of good faith towards shareholders . . . and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits, and must account for them to the company."

Directors are trustees for the company and **not for the individual shareholder.**

Percival v. Wright, [1902] 2 Ch. 421.

Directors bought shares from a shareholder while they were negotiating for the sale of the company at a very high price, but did not tell him of this fact:—**Held**, the purchase of the shares was good.

And they are not trustees for third parties who have made contracts with the company (*c*).

Directors do not have to account so strictly as the trustees of, *e.g.*, a marriage settlement, and in many ways they differ from ordinary trustees.

Smith v. Anderson (1880), 15 Ch. D. 247.

JAMES, L.J.: "A trustee is a man who is the owner of property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee. . . . The office of a director is that of a paid servant of the company. A director

(*b*) *Punt* v. *Symons & Co., Limited*, [1903] 2 Ch. 506, *Piercy* v. *S. Mills & Co.* [1920] 1 Ch. 77 (where the directors issued shares to themselves for the purpose of getting the majority of the voting power).

(*c*) *Bath* v. *Standard Land Co.*, [1911] 1 Ch. 618.

never enters into a contract for himself, but for his principal . . . he cannot sue on such contracts, nor be sued on them (unless he exceeds his authority)."

Directors are described as trustees, agents, or managing partners, not as exhausting their powers or responsibilities, but as indicating useful points of view. "**It does not matter much what you call them,** so long as you understand what their true position is, which is that they are merely **commercial men, managing a trading concern for the benefit of themselves and all other shareholders** in it" (JESSEL, M.R., 10 Ch. D. 452).

(2) Directors are **agents for the company.** When they make contracts for the company, they are not liable themselves, unless they contract in their own names; then the other party can sue either the company or the directors, at his option.

Even if they make a contract which is *ultra vires*, and so cannot bind the company, the directors do not render themselves liable (except sometimes on an implied warranty of authority). See *Weeks* v. *Propert*, p. 146.

If the act done is not beyond the powers of the company, but only beyond the powers of the directors, then—

(1) If the contract is made with a member, it is voidable.

(2) If made with an outsider who had no notice of the want of powers, it binds the company.

Such an act of directors may also be made valid by the acquiescence of **every** shareholder.

SECTION 2.

Appointment of Directors.

The first directors are usually named in the Articles.—This is not now a valid appointment unless each of the proposed directors has—

(i.) signed and filed with the registrar a consent to act as director; and

(ii.) signed the memorandum for his qualification shares or a contract to take them from the company and pay for them (*e*).

If not named in the Articles, the first directors are appointed by the subscribers to the Memorandum. This must be done either—

(1) by the **majority at a meeting** of subscribers; or

(2) by a writing signed by **all** the subscribers.

If they do not meet, **all** the subscribers must sign the appointment, unless the Articles provide otherwise. See—

John Morley Building Co., [1891] 2 Ch. at p. 392, and **Re Great Northern Salt Works** (1890), 44 Ch. D. 472.

The company adopted Table A. (see p. 46, *ante*), which contains no provisions on this subject. A meeting of three of the seven subscribers appointed A., B., C., and D. as directors. Later, all seven subscribers signed a document appointing A., B., C., and E. as directors:—**Held,** the first appointment was bad, the second good.

The way in which **subsequent appointments of directors** are to be made is usually specified in the

(*e*) Companies Act, s. 72. This does not apply to a private company.

Articles, *e.g.*, by the company in general meeting, or by the continuing directors. If no provision is made, or if the directors fail to appoint any one, the company in general meeting has power to appoint new directors (*f*).

Power may be given to an outsider to appoint directors: *British Murac Syndicate* v. *Alperton Rubber Co.*, [1915] 2 Ch. 186.

A company must keep a register of its directors, and send copies of the register to the registrar and must also notify to the registrar any change among its directors (*g*).

SECTION 3.

Quorum.

A **quorum** is the number of directors who must be present at any meeting.

The **minimum number** is the number of directors who must be holding office at any time.

If a **minimum number** of directors is fixed by the Articles, and the number falls below the minimum, the remaining directors cannot act. But the Articles may authorise the directors to act in spite of a vacancy.

Re Bank of Syria, [1901] 1 Ch. 115.

By the Articles the affairs of the company were to be conducted by a council of not less than three. Article 42 allowed the Council to act in spite of a vacancy. The numbers of the council were reduced to two. The remaining two gave certain securities:— **Held,** these securities would have been void, but were saved by Article 42.

The **quorum** of directors is usually fixed by the Articles. A quorum may be defined as "The number

(*f*) *Barron* v. *Potter*, [1914] W. N. 131.
(*g*) Companies Act, s. 75,

of directors **qualified to act** who must be present at a meeting to enable them to act as a board."

Re Greymouth Point Elizabeth Railway, [1904] 1 Ch. 32.

The Articles contained a clause the same as Article 86 (on p. 41), and two directors were to be a quorum. There were only three directors : two of these lent £2000 to the company, and the board (viz., the three directors) agreed to give them debentures to secure it. Thus, though three directors were present, two were disqualified from voting under Article 86 : —**Held**, the agreement was void (*h*).

If no quorum is fixed by the Articles, the number of directors who usually act will be sufficient; but in any case, notice of the meeting must be given to **all** the directors (*i*).

SECTION 4.

Qualification.

There need not be any qualification for directors, but the Articles usually provide that no person shall act as director unless he holds a certain number of shares (*j*) or stock. See Art. 84 on p. 41 *ante*.

If any qualification is fixed, then—

(1) It must be **disclosed in the prospectus** (*k*);

(2) Each director **must take his qualification shares within two months** of his appointment, otherwise he vacates office, and renders himself liable to a fine of £5 for every day that he acts as director (*l*).

(3) The **company cannot commence business until**

(*h*) See also *North Eastern Insurance Co.*, [1919] 1 Ch. 198.
(*i*) *Lyster's Case*, L. R. 4 Eq. 233.
(*j*) Shares in respect of which warrants to bearer have been issued, cannot be used as qualification shares. Companies Act, s. 37 (4).
(*k*) Companies Act, s. 81 (1) (b). (*l*) *Ibid.*, s. 73.

every director has taken up his qualification shares and paid on them, if payable in cash, the same proportion as the public have to pay on application and allotment (*m*).

The Articles frequently provide that the qualification of a director shall be the holding of a certain number of shares "in his own right." It would perhaps be better to provide that he must hold them "beneficially," for the former words are satisfied if the director holds the shares as "trustee for others" (*n*), unless it appears on the register that he is merely a trustee.

Boschoek Proprietary Co. v. Fuke, [1906] 1 Ch. 148.

A director was entered on the register as the holder of shares as liquidator of another company :—**Held,** he was not qualified.

And the director must hold the shares in such a way that the company may safely deal with him as owner of the shares.

Sutton v. English & Colonial Co., [1902] 2 Ch. 502.

The qualification of a director was the holding of 100 shares "in his own right." S., a director, held 1000 shares. S. became bankrupt; his trustee in bankruptcy gave notice to the company that he claimed the shares, but did not wish to be registered for a few days. The board of directors excluded S. as being disqualified :—**Held,** S. was disqualified.

Shares which are held by a director jointly with any other person may be a sufficient qualification (*o*).

If a director takes his qualification shares as a

(*m*) Companies Act, s. 87.

(*n*) *Pulbrook* v. *Richmond Consolidated Co.*, 9 Ch. D. 610. *Howard* v. *Sadler*, [1893] 1 Q. B. 1. In such a case the dividends on the shares belong to the beneficiaries, but the remuneration of the director or trustee belongs to him (*Re Dover Coal-Field, Limited*, [1908] 1 Ch. 65).

(*o*) *Grundy* v. *Briggs*, [1910] W. N. 17.

present from the promoters, this is a breach of trust, and he must account to the company for the amount.

Hay's Case (1875), 10 Ch. App. 604.

The directors agreed with Hay, that if he would become a director they would give him forty £25 shares as his qualification. The promoters then paid Hay £1000. Hay then applied to the company for the shares, and paid £1000 for them :—**Held**, Hay holds the £1000 as trustee for the company.

If a director holds his qualification shares as a nominee or trustee for a promoter, he is liable to the company for damages, which will usually be the nominal value of the shares (*p*).

A director must take up his qualification within two months of his appointment (*q*).

Disqualification and Removal.

A director becomes disqualified if he loses his qualification, or if he does any act which, by the Articles, amounts to a disqualification (see Art. 85 on p. 41) *e.g.*, to hold a paid office under the company such as a paid trustee of a debenture deed (*Astley* v. *New Tivoli*, [1899] 1 Ch. 151).

"Absenting himself," as in clause 85 (c) (p. 41, above), refers only to voluntary absence.

Mack's Claim, [1900] W. N. 114.

A director who lived in Belfast was seriously ill and unable to travel, and failed to attend several meetings :—**Held**, he did not vacate his office.

When the disqualification consists in "making a secret profit," the disqualification does not prevent re-election after the transaction is complete.

Re Bodega, [1904] W. N. 7.

W., one of the directors, made a secret profit in 1900. He was re-elected in 1901. In 1902 the secret profit was discovered :—

(*p*) *London & South Western Canals, Ld.*, [1911] 1 Ch. 346. It is difficult to see on what principle this decision is based.
(*q*) S. 73.

Held, the disqualification ceased as soon as it became complete in 1900, and the re-election in 1901 made him a director again.

A disqualified director ceases to be a director, and therefore cannot act. If he does act, the company may restrain him from doing so by injunction, but cannot sue him for damages.

An individual shareholder cannot take any proceedings against him for acting; for an individual shareholder cannot, as a rule, sue to redress a wrong done to the company. This is the rule in *Foss* v. *Harbottle* (1843), 2 Ha. 461.

Burland v. Earle, [1902] A. C. 83.

Directors instead of paying profits to shareholders invested them:—**Held,** To redress a wrong done to the company the action should be brought by the company itself, except where the **persons against whom relief is sought hold the majority of the shares** and will not allow the company to bring an action; and even then, only in cases of fraud and **ultra vires,** and not for mere informalities (*r*).

The Articles generally contain a clause that if it shall afterwards appear that the directors were disqualified, or improperly elected, any acts done by them shall be valid in spite of the disqualification. See Art. 99 on p. 42.

This applies both to dealings with outsiders and to dealings with the members of the company.

British Asbestos Co. v. Boyd, [1903] 2 Ch. 439.

B., R., and M. were directors. Two formed a quorum. The Articles contained the same clause as Article 99 (on p. 42), and it was a disqualification to hold any office of profit in the company.

(*r*) As to the use of the company's name see *Normandy* v. *Ind Coope, Limited,* [1908] 1 Ch. 84; and *Marshall's Valve Co.* v. *Manning & Co.,* [1909] 1 Ch. 267 (where the solicitor was held personally liable to pay the costs); and *Baillie* v. *Oriental Co.,* [1915] 1 Ch. 503 (where a special resolution had been obtained by a trick).

M. resigned. B. became secretary for two months, and was therefore disqualified. During that time B. and R. appointed D. as director. The appointment of D. was disputed:—**Held,** D.'s appointment was valid. Article 99, together with sect. 67 of the Companies Act, 1862 (now section 71), covers cases where the facts causing disqualification were known at the time, but the knowledge was not present to the minds of the directors. Also, this clause applies to a question of internal management, such as the appointment of a director.

A director who has resigned cannot withdraw his resignation (*s*).

A director who is unsatisfactory may be removed by the company, but the power of removal is governed entirely by the Articles (*t*).

If there is no such power in the Articles, the company may give itself the power by special resolution.

SECTION 5.

Remuneration of Directors.

The remuneration of the directors (if any) must be stated in the prospectus (*u*).

Directors are not entitled to any remuneration apart from express agreement.

The Articles usually provide for their remuneration; if so, it cannot be changed or increased without a special resolution (*x*).

Directors cannot get their travelling and other expenses in addition to their remuneration, unless this is expressly provided for (*y*).

If the Articles provide for remuneration, it becomes

(*s*) *Glossop* v. *Glossop*, [1907] W. N. 170.
(*t*) *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1.
(*u*) Companies Act, s. 81 (1) (b).
(*x*) *Boschoek Co.* v. *Fuke*, [1906] 1 Ch. 148.
(*y*) *Young* v. *Naval, Military, etc., Limited*, [1905] 1 K. B. 687.

a debt due from the company to the directors, and may be sued for, and may be paid out of capital if there are no profits.

Re Lundy Granite Co. (1872), 26 L. T. 673.

The remuneration was to be one-tenth of the profits, but not less than £100 a year. There were no profits for several years:—**Held,** the directors were entitled to £100 a year.

When a company is making no profits, the directors frequently agree to waive their remuneration, but they are not bound to do so.

There is sufficient consideration to support such an agreement, if the several directors mutually agree to waive their claims (*z*).

If the remuneration is to be "at the rate of £— a year," a director who acts for **part** of a year is entitled to a proportionate share of remuneration.

If the remuneration is to be "a yearly sum of £—," or even "£— per annum," it has been held that he will not get anything in any year unless he acts for the whole year.

Inman v. Ackroyd and Best, Limited, [1901] 1 K. B. 613.

The remuneration was to be "the sum of £125 per annum per director." I. served for one year and seven months:—**Held,** if it had been "at the rate of" £125 per annum, I. would be entitled to be paid for one year and seven months. But in this case he is only entitled to be paid £125 for the one complete year.

This decision has, however, been doubted. The remuneration in such a case appears to be apportionable under the Apportionment Act (*a*).

If a director is a trustee of his qualification shares, he may retain his remuneration for himself (*b*).

(*z*) *West Yorkshire Darracq, Ld.* v. *Coleridge*, [1911] 2 K. B. 327.
(*a*) *Moriarty* v. *Regent's Garage Co.*, [1921] 1 K. B. 423; *Diamond* v. *English Sewing Cotton Co.*, [1922] W. N. 237.
(*b*) *Re Dover Coal Field, Limited*, [1907] W. N. 119.

SECTION 6.

Powers of Directors.

The powers of the directors are generally described in the Articles and there is usually a clause giving them powers of management and all the powers of the company which are not otherwise dealt with. See Art. 106 on p. 43.

This general clause is not to be construed "**ejusdem generis**," but is valid and effectual.

Re Pyle Works (No. 2), [1891] 1 Ch. 173.

Two directors of the P. Company gave a guarantee to a railway company, by reason of which the railway company agreed to carry goods on credit for the P. Company. The board of the P. Company therefore agreed that it should indemnify the two directors by a charge on its uncalled capital. The **Articles** only gave directors power to secure money when **borrowed**. The **Memorandum** gave the **company** power to issue securities generally. The Articles contained clause 106 (on p. 43):—**Held,** the directors have power to give this charge.

The directors are the only persons who can deal with the matters thus assigned to them, and their decision cannot be overruled even by a general meeting of the company (*c*), unless the Articles are altered by a special resolution, or unless the directors are acting in their own interests against the interests of the company (*d*). They should, however, communicate their policy to the shareholders, and are bound to do so, if their policy is attacked by any of the shareholders (*e*).

The shareholders may enlarge the powers of the directors, and so enable them to do anything that the company could do; or, if the directors do some act beyond their powers, the shareholders may ratify their act, if it is within the powers of the company.

A director cannot make a contract with the

(*c*) *Automatic Filter Co.* v. *Cunninghame*, [1906] 2 Ch. 34; *Salmon* v. *Quin & Axtens, Limited*, [1909] 1 Ch. 311.
(*d*) *Marshall's Valve Gear Co.*, [1909] 1 Ch. 267.
(*e*) *Peel* v. *London & North-Western Rail. Co.*, [1907] 1 Ch. 5.

company; otherwise there would be a conflict between his own private interest and his duty to the company.

Any such contract will be held to be void, without any inquiry as to its fairness.

Parker v. McKenna (1874), 10 Ch. App. 118.

S. agreed to take 9000 shares on certain terms by which he was to pay £30 premium down, and the rest by instalments. The directors took over part of his bargain and released him from some of its terms:—**Held**, this was a contract in which it was important for the directors to watch the interests of the company. Therefore the contract with them was void, and they must refund the profit made on the shares.

The same rule applies to a contract by the company with another company in which a director of the first company holds shares. *Transvaal Land Co.*, [1914] 2 Ch. 488.

There are two exceptions to this rule—

(1) A director may agree to take shares or debentures of the company.

(2) The Articles may modify the rule and allow a director to make contracts with the company, provided, *e.g.*, that he does not vote. See Art. 86 on p. 41.

This does not necessarily prevent him from voting on the same question at a meeting of shareholders (*f*).

The directors must act at a meeting (called a "**board meeting**") unless the Articles give them power to act otherwise. The meeting must be duly summoned; that is, due notice of the meeting must be given to every director. The meeting may be held anywhere, *e.g.*, in a passage (*g*).

(*f*) *North-West Transportation Co.* v. *Beatty*, [1887] 12 A. C. 589, but see *Cook* v. *Deeks*, [1916] 1 A. C. 554.

(*g*) *Smith* v. *Paringa Mines*, [1906] 2 Ch. 193.

The decisions of the directors take the form of **resolutions**, *e.g.*, "Resolved that shares Nos. —— to —— be allotted to ——," etc.

Minutes of the meetings are kept and signed by the chairman, but an unrecorded resolution may be proved *aliunde* (*h*).

Directors may not delegate their powers unless the Articles expressly give them power to do so.

Re Liverpool Household Stores (1890), 59 L. J. Ch. 624.

Directors, under powers expressly given by the Articles, delegated all their powers to a committee of three. This was recognised as valid.

The powers of directors cease on the commencement of a winding-up (*i*).

SECTION 7.

Liability of Directors.

Directors are not personally liable on the contracts which they make as agents for the company, but they may be liable—

(1) on an implied warranty of authority (see p. 146);

(2) to persons who subscribe for shares, in case of untrue statements in the prospectus (*j*); or

(3) to the company where they have acted in a manner which is **ultra vires.**

It is not necessary to prove fraud, where directors have applied capital in payment of objects **ultra vires,**

(*h*) *Knight's Case* (1867), L. R. 2 Ch. 321; *Fireproof Doors, Ld.*, [1916] 2 Ch. 142.
(*i*) Companies Act, s. 186 (iii).
(*j*) *Ibid.*, s. 84.

e.g., in the payment of dividends out of capital (*Masonic Co.* v. *Sharpe*, [1892] 1 Ch. 154, at p. 165).

(4) to the company in case of "**gross negligence.**"

"Gross negligence" means failure to use the care of an ordinary person in his own affairs (*k*).

Re City Equitable Fire Insurance Co.
(1924), *Times Newsp.*, 23rd May and 12th July.

The directors left the whole control of the dealings with the uninvested funds of the company in the hands of Bevan, who was the managing director and the senior partner in the firm who acted as brokers of the company. Very large sums were left in the hands of the brokers and were lost to the company. The directors acted honestly and had entire confidence in Bevan, who was at the time a financier of high reputation:—**Held,** the directors who passed the annual balance sheets were guilty of negligence in not ascertaining how the funds of the company appearing in the balance sheets were invested; but **held also** that the directors were excused from liability by an article which provided that they should only be responsible for "*wilful default.*"

If directors act **within their powers** in the **bonâ fide** exercise of their discretion, they are not liable for mere errors of judgment, and the burden of proof lies on those who seek to charge them with bad faith.

Re New Mashonaland Co., [1892] 3 Ch. 577.

The directors agreed to lend £1250 to G., on his giving security. Cheques were paid to G. at once, but he never gave security:—**Held,** this is a doubtful case, but the burden of proof lies on the plaintiffs to prove fraud, and they have not done so. The directors are not liable, as they have exercised their judgment and are not liable for mere errors of judgment.

A director is not liable if he can show that he acted without knowledge of the facts which made his act

(*k*) *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. at p. 804; *Brazilian Rubber Plantations*, [1911] 1 Ch. at p. 436.

illegal, provided he was not guilty of negligence (*kk*). And in any case if he has acted honestly and reasonably and ought fairly to be excused, **the court can relieve him from liability** (*l*), even if his acts have been **ultra vires** (*m*).

A director who habitually abstains from board meetings may become liable for the acts of his co-directors. But he is not bound to attend all board meetings.

Re Denham & Co. (1883), 25 Ch. D. 752.

All the powers of management were vested in D. C., one of the directors, did not attend the board meetings as a rule. Dividends were paid for four years out of capital. C. himself on one occasion moved a resolution for a dividend at fifteen per cent., but he had no reason to suspect any misconduct:—**Held,** C. was not liable.

A director who signs cheques makes himself liable if the cheque ought not to have been paid, unless he takes reasonable care to satisfy himself of the purpose for which and the authority under which the cheques have been signed (*n*).

One method by which a director may be made liable is by a "misfeasance" summons.

This is an application to the court by summons in the winding up, made by the liquidator or any creditor or contributory under sect. 215 of the Companies Act (*nn*).

If one of several directors has been made to pay for misfeasance, he is entitled to contribution from the others.

(*kk*) *Dovey* v. *Cory*, [1901] A. C. 477.
(*l*) Companies Act, s. 279.
(*m*) *Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543.
(*n*) *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381, at p. 404.
(*nn*) A summons for directions must now be taken out as in an action, and the summons is usually heard with witnesses. [1921] W. N. 356; [1922] W. N. 294.

Ashurst v. Mason (1875), L. R. 20 Eq. 225.

B., a director, held 250 shares with nothing paid. He resigned. His shares were, by a resolution of the directors, transferred to A., one of the directors, in trust for the company. This, of course, was illegal. The company was wound up, and A. had to pay in full :—**Held**, all the directors are liable to contribute their shares of this loss.

This case was followed and explained in

Jackson v. Dickinson, [1903] 1 Ch. 952.

The same rule applies to his liability under the section 84 of the Companies Act, and even though some of the directors are dead (*n*) ; but not if he has been guilty of fraud and the others have not (*o*).

If shareholders holding at least one-tenth of the issued shares of a company think the conduct of the directors requires investigation, they may apply to the Board of Trade to appoint inspectors to investigate the affairs of the Company (*p*).

Directors may also become liable for penalties if they do not comply with certain of the provisions of the Companies Act, which include

(1) Keeping a register of members (s. 25, penalty £5 per day).

(2) Making an annual list and summary (s. 26, penalty £5 per day).

(3) Sending to the registrar notice of conversion of shares into stock or of consolidation or division of shares (s. 42, no penalty specified).

(4) Calling a general meeting every year within the proper time (s. 64, penalty £50).

(*n*) *Shepheard* v. *Bray*, [1906] 2 Ch. 235; but see S. C., [1907] 2 Ch. 571.
(*o*) Companies Act, s. 84 (4).
(*p*) *Ibid.*, s. 109.

(5) (*q*) Sending in a proper report before the statutory meeting (s. 65, no penalty expressed).

(6) Sending to the registrar copies of special and extraordinary resolutions (s. 70, penalty £2 per day).

(7) Keeping a register of directors and notifying changes in the board (s. 75, penalty £5 per day) (*r*).

(8) Allotments of shares not to be made until minimum subscription subscribed, etc. (ss. 85, 86, penalty compensation to the company).

(9) Sending in a proper return of allotments (s. 88, penalty £50 per day).

(10) Stating in every balance sheet the amount paid by way of underwriting commission until written off (s. 90, no penalty expressed).

(11) Having certificates ready for delivery (s. 92, penalty £5 per day).

(12) Keeping registers of mortgages and charges and allowing inspection (ss. 93, 100 (fine £50), 101 (fine £5), 102 (fine £5)).

(13) **On winding up.**—Submitting a statement of affairs (s. 147, penalty £10 per day).

It is usually the duty of the secretary of the company to make himself acquainted with all the details of the Companies Act, and to see that the directors comply with its requirements.

(*q*) This does not apply to a private company.
(*r*) As amended by the Companies (Particulars as to Directors) Act, 1917.

CHAPTER XV.

MEETINGS AND RESOLUTIONS.

SECTION 1.

Meetings.

USUALLY two persons at least are necessary to constitute a meeting.

But where all the shares of a particular class are held by one person, such person alone may do what a meeting of shareholders of that class could do under the articles (*a*).

Meetings of shareholders are of three kinds:

(1) **Statutory meeting.**—A company must hold a general meeting within not less than one month and not more than three months from the date at which it is entitled to commence business (*b*). This meeting is called the **statutory meeting.** A report must be sent to all the shareholders seven days before this meeting, stating:

(a) the number of shares allotted, how much has been paid up and the consideration for allotment;

(b) the cash received by the company for these shares;

(c) an abstract of the receipts and payments of the company, and an estimate of the preliminary expenses;

(d) names, etc., of directors, auditors, manager and secretary;

(e) if any contract is to be submitted to the meeting for

(*a*) *East* v. *Bennett Brothers, Ld.*, [1911] 1 Ch. 163.
(*b*) Companies Act, s. 65.

modification, then particulars of the contract and the proposed modifications.

A list of members must be produced at the meeting.

This ensures that, within a short time from the commencement of a company, all the shareholders shall have a chance of ascertaining the exact position of the company.

The company cannot before the statutory meeting alter the terms of any contract referred to in the prospectus except subject to the approval of the statutory meeting (*c*).

The notice convening the statutory meeting should state that it is intended to be the statutory meeting (*d*).

(2) **Ordinary meeting.**—The Articles generally provide that there shall be an **annual general meeting,** to be held on a certain date. This is an ordinary meeting. There must be at least one general meeting every calendar year, not more than 15 months after the previous meeting (*e*).

(3) **Extraordinary meeting.**—If there is some business which must or ought to be transacted before the next ordinary meeting, the directors may call an extraordinary meeting.

The holders of not less than one-tenth of the issued shares of the company (upon which all calls or other sums then due have been paid) (*f*) may at any time compel the directors to call an extraordinary meeting (*g*).

(*c*) Companies Act, s. 83.
(*d*) *Gardner* v. *Iredale*, [1912] 1 Ch. 700.
(*e*) Companies Act, s. 64, penalty £50; and see *Smedley* v *Registrar of Companies*, [1919] 1 K. B. 97.
(*f*) As to the meaning of this phrase, see *Fruit & Vegetable Association* v. *Kekewich*, [1912] 2 Ch. 52.
(*g*) Companies Act, s. 66, which also provides for the manner in which the meeting shall be held.

The Articles may extend this power (*e.g.*, by allowing the holders of one-twentieth of the issued capital to requisition a meeting), but they cannot restrict it.

If the directors neglect to call the meeting, the requisitionists may call it themselves. Such a requisition must be signed by the requisitionists, and in case of joint holders of shares all the joint holders must sign (*h*).

All these meetings are general meetings, and similar business may be transacted at all of them.

Every member is entitled to notice of a general meeting.

Smythe v. Darley (1849), 2 H. L. Cas. 789.

On an election of a treasurer for Dublin by the board of magistrates, notice was not sent to one of the board:—**Held,** the board were a corporate body, and the election was void.

But the Articles nearly always modify this rule, and provide that notices may be sent by post, etc. See Articles 58 and 59 on p. 38.

If special business is to be transacted, the notice must specify its nature.

Tiessen v. Henderson, [1899] 1 Ch. 861.

A notice convening extraordinary general meetings to consider two alternative schemes of reconstruction of the company did not disclose that the directors were strongly interested as underwriters, etc., in one of the schemes:—**Held,** the notice was bad (*i*).

But notices are not construed very strictly.

(*h*) *Patentwood Keg Syndicate* v. *Pearse*, [1906] W. N. 164.
(*i*) And see *Normandy* v. *Ind Coope*, [1908] 1 Ch. 84, and *Baillie* v. *Oriental Co.*, [1915] 1 Ch. 503.

Young v. South African Syndicate, [1896] 2 Ch. 268.

The notice of a meeting stated that the object was to adopt new regulations instead of Table A, but did not set out the contents of the new regulations:—**Held,** this notice was good (*k*).

But a notice must be sufficient to show the members substantially what is proposed to be done, *e.g.* a notice of a resolution to increase the capital should specify the amount of the proposed increase (*Macconnell* v. *E. Prill & Co., Ltd.*, [1916] 2 Ch. 57).

A meeting once properly convened cannot be postponed by the directors (*l*).

Quorum.

The quorum for meetings of shareholders is generally fixed by the Articles; if not, two members at least must be present (*m*).

Sometimes one member may be a quorum (*re Fireproof Doors, Ltd.*, [1916] 2 Ch. 142).

A representative appointed by a company (see p. 214) is a member "personally present," and may be counted in a *quorum* accordingly (*Kelantan Coco Nut Estates, Ld.*, [1920] W. N. 274).

Chairman.

The **chairman** is often appointed by the Articles; if not, each meeting elects its chairman.

If the chairman prematurely closes the meeting, another chairman may be elected.

(*k*) And see *Betts & Co., Limited* v. *Macnaghten*, [1910] 1 Ch. 430 (a notice that a certain resolution would be passed "with such amendments as shall be determined on at the meeting" was held good).

(*l*) *Smith* v. *Paringa Mines*, [1906] 2 Ch. 193.

(*m*) Except where all the shares of the class are held by one person. *East* v. *Bennett Brothers, Ld.*, [1911] 1 Ch. 163.

National Dwellings Society v. Sykes, [1894] 3 Ch. 159.

General meeting called to pass the accounts and re-elect directors. The chairman proposed "that the accounts be passed." A shareholder moved an amendment that a committee of inquiry be appointed. The chairman refused to take the amendment. He put the original motion, which was lost, and then dissolved the meeting at once. The shareholders then appointed a new chairman and appointed a committee of inquiry :—**Held,** these appointments were good.

But the chairman has a discretion, and every shareholder is not entitled to talk as much as he likes.

Wall v. London Assets Corporation (1898), 14 T. L. R. 496

After a long discussion, several members still wanted to speak, the chairman moved that "the question be now put," and the resolution was passed :—**Held,** the resolution was properly passed.

Votes.—Each shareholder has one vote, either on a show of hands or on a poll. But the Articles usually modify this rule, and make the voting power depend on the number of shares held.

The person who appears on the register as the holder of a share is the only person entitled to vote in respect of it (*m*).

But he may be ordered by the court to vote in the manner indicated by some other person, e.g., by a mortgagor of shares (*mm*).

The method of voting is as follows: The chairman first takes a show of hands. In this, each member present counts for one only, even if he holds proxies (*Ernest* v. *Loma Co.*, [1897] 1 Ch. 1). In case of an ordinary resolution, any five members (or the number specified in the Articles) may then **demand a poll**; in case of a special resolution, any three members (or

(*m*) *Wise* v. *Lansdell*, [1921] 1 Ch. 420.
(*mm*) *Puddephatt* v. *Leith*, [1916] 1 Ch. 200.

the number, not exceeding five, specified in the Articles), may demand a poll (*n*).

The chairman then fixes the time and place for taking the poll. He may declare that it shall be taken then and there, unless the Articles provide otherwise. But he must not declare that it shall be taken in any way inconsistent with the regulations, *e.g.*, by voting papers (*McMillan* v. *Le Roi Mining Co.*, [1906] 1 Ch. 331).

When the poll is taken, each person voting signs a paper "for" or "against" the resolution, and proxies are counted.

A **proxy** is a writing (stamped 1*d.*) authorising a person to vote for a shareholder at a certain meeting; or it may authorise him to vote at a series of meetings. (If so, it must be stamped 10*s.*) (*o*).

There is no power to vote by proxy unless it is expressly provided for by the Articles.

The Articles usually provide that proxy papers shall be deposited at the office before the meeting; if not, the person voting is not bound to prove at the meeting his authority to vote, and his vote ought to be accepted, even if he cannot produce the proxy paper at the time.

Re English, Scottish and Australian Bank, [1893] 3 Ch. 385.

The bank had its principal business in Australia. A reconstruction scheme was proposed. The judge ordered that proxies from Australian shareholders should be notified by telegraph:—**Held,** the proxies were good, though they could not be produced at the meeting.

If a proxy is given for a particular meeting, the date of the meeting may be filled in afterwards (*p*).

The cost of obtaining the signature of proxy papers may be paid out of the funds of the company (*q*).

(*n*) Companies Act, s. 69.
(*o*) *Isaacs* v. *Chapman*, [1916] W. N. 28; 32 T. L. R. 237.
(*p*) *Sadgrove* v. *Bryden*, [1907] 1 Ch. 318.
(*q*) *Peel* v. *London & North-Western Railway Co.*, [1907] 1 Ch. 5.

If a company is a member of another company, it may appoint a representative to vote (*r*).

The appointment of the representative may be proved by producing a copy of the resolution appointing him (*s*).

A corporation which is a shareholder is usually required to appoint its proxies under seal. But this is not required if the corporation has not got a seal (*s*).

During war the voting rights of shareholders, who are alien enemies, are suspended (*t*).

SECTION 2.

Resolutions.

Resolutions are of three kinds:

1. **Ordinary.**—That is, a resolution passed by a majority of persons present at a general meeting. The resolution is passed in the ordinary way and entered in the minute book by the chairman. The chairman's entry of an ordinary resolution is evidence that it has been properly passed (*u*).

2. **Special resolutions.**—These are necessary for the following purposes among others—

(a) to alter the Articles of the company;
(b) to alter the Memorandum with leave of the court;
(c) to change the name of the company with the consent of the Board of Trade;
(d) to reduce the capital with leave of the Court;
(e) to sub-divide shares (*x*).

A special resolution necessitates **two meetings.** At the first it must be passed by **a three-quarters majority** of those present. The second meeting must be held not less than fourteen days and not more than

(*r*) Companies Act, s. 68.
(*s*) *Colonial Gold Reefs, Ld.*, [1914] 1 Ch. 382.
(*t*) *Robson* v. *Premier Oil Co.*, [1915] 2 Ch. 124.
(*u*) Companies Act, s. 71.
(*x*) *Ibid.*, s. 41.

one month after the first (*z*). The resolution must be **confirmed** at the second meeting **by a simple majority.**

Notice of meeting to pass special resolution.—Unless there are express provisions in the Articles (*a*) it is not sufficient to send one notice stating that a second meeting will be held if the resolution is passed at the first meeting (*b*); but the notice may state that the second meeting will be held in any case unless notice to the contrary is given (*c*).

The declaration by the chairman that a special resolution has been carried is **"conclusive,"** unless a poll is demanded (*d*). It was at one time held that "conclusive" meant only "*primâ facie*," but this is now overruled.

Re Hadleigh Castle Gold Mines, [1900] 2 Ch. 419.

A meeting was held to pass an extraordinary resolution (see below) to wind up the company. The chairman declared that it was carried on a show of hands. No poll was demanded. A shareholder afterwards contended that it had not been passed by a three-quarters majority:—**Held,** the chairman's declaration is conclusive, and the court cannot go into the question.

But the chairman's declaration will not make a resolution good if the declaration itself shows that it was bad.

Re Caratal New Mines, Limited, [1902] 2 Ch. 498.

A special resolution for reconstruction was proposed. The chairman put the question. Then he said, "Those in favour, 6;

(*z*) The resolution will be bad if the second meeting is held less than 14 clear days after the first (*Railway Sleepers Supply Co.*, 29 Ch. D. 204), or more than one month after the first meeting (*Malleson* v. *National Insurance Corporation*, [1894] 1 Ch. 200, at p. 206).

(*a*) *North of England Steamship Co.*, [1905] 2 Ch. 15.

(*b*) *Alexander* v. *Simpson*, [1890] 43 Ch. D. 139.

(*c*) *Re Espuela Land Co.*, [1900] W. N. 139.

(*d*) Companies Act, s. 69.

against, 23; but there are 200 voting by proxy, and I declare the resolution carried":—**Held, proxies cannot be counted on a show of hands,** therefore the declaration was, on the face of it, illegal, and the resolution was void.

3. **Extraordinary resolutions.**—An extraordinary resolution is the first half of a special resolution; that is, it is a resolution passed by a three-quarters majority of the members present at a general meeting, of which notice specifying the intention to propose the resolution **"as an extraordinary resolution"** has been given (*e*). It need not be confirmed. It may be used to wind up a company voluntarily on the ground that it cannot continue its business by reason of its liabilities, and that it is advisable to wind it up (*f*).

If **all** the members of the company are present and vote for the resolution, it will be valid, in spite of informalities, both in the case of an ordinary (*g*) or an extraordinary (*h*) resolution.

A copy of every special resolution and of every extraordinary resolution must be sent to the Registrar (*i*).

Amendments.—When a resolution has been moved, an amendment may be put, if it is within the business covered by the notice convening the meeting, but not otherwise (*j*).

Where a resolution has been passed as a special resolution, no amendment can be made at the confirmatory meeting (*k*).

(*e*) Companies Act, s. 69. *Macconnell* v. *E. Prill & Co., Ld.*, [1916] 2 Ch. 57.
(*f*) Companies Act, s. 182.
(*g*) *Express Engineering Works*, [1920] 1 Ch. 466.
(*h*) *Oxted Motor Co.*, [1921] 3 K. B. 32.
(*i*) Companies Act, s. 70.
(*j*) *Teede & Bishop, Ld.*, [1901] W. N. 52.
(*k*) *Wall* v. *London, etc., Corp.*, [1898] 2 Ch. at p. 483.

CHAPTER XVI.

ACCOUNTS AND AUDITORS.

SECTION 1.

Accounts.

DIRECTORS being agents and trustees for the company are bound to keep proper accounts, and they should be kept in a manner which prudent business people would adopt (*a*). A capital account must be included in the annual summary (*b*) (see p. 93). The Articles generally provide that copies of the accounts are to be sent to the shareholders; if so, preference shareholders and debenture holders must have the same rights in this respect as the ordinary shareholders (*c*).

The accounts are presented and passed at the annual general meeting.

The accounts must state the amount of capital (if any) which has been used to pay interest upon money spent on constructive works (*d*), and the amount which has been paid for underwriting, until written off (*e*).

On the next page will be found a form of accounts presented by the directors of an existing company to the shareholders.

(*a*) *Hinds* v. *Buenos Ayres Co.*, [1906] 2 Ch. 654.
(*b*) Companies Act, s. 26.
(*c*) *Ibid.*, s. 114.
(*d*) *Ibid.*, s. 91 (7).
(*e*) *Ibid.*, s. 90.

BLANK COMPANY,
BALANCE SHEET,

LIABILITIES.

	£	s.	d.	£	s.	d.
To Share Capital authorised—						
150,000 Cumulative 5½ per cent. preference shares of £1 each	150,000	0	0			
Less 8,000 cancelled in accordance with special resolution passed November 5th, 1909, confirmed November 22nd, 1909 ...	8,000	0	0			
				142,000	0	0
50,000 Ordinary shares of £1	50,000	0	0			
Less 8,000 cancelled in accordance with special resolution passed and confirmed as above	8,000	0	0			
				42,000	0	0
				£184,000	0	0
Issued and subscribed (a)—						
125,000 Cumulative 5½ per cent. preference shares of £1 each	125,000	0	0			
Less 8,000 cancelled as above	8,000	0	0			
				117,000	0	0
50,000 Ordinary shares of £1 each	50,000	0	0			
Less 8,000 cancelled as above	8,000	0	0			
				42,000	0	0
				159,000	0	0
To 6 per cent. 1st Mortgage Debenture Stock				20,000	0	0
,, Sundry Trade and other Creditors (c)				48,486	16	0
,, Bills Payable				19,973	15	4
,, Reserve Account (b)				8,500	0	0
,, Bad Debt Reserve Account (b)				1,204	1	8
,, Building ,, ,, (b)				700	0	0
,, Insurance Reserve (b)				175	0	0
,, Exchange Reserve at Shanghai				71	3	4
,, Suspense Account for Dividend on Preference Shares (1st Oct. to 31st Dec., 1909)				1,608	15	0
,, Profit and Loss Account balance, as per Account below (e)				3,397	12	8
(NOTE.—Contingent Liability on Bills discounted £4,888 0 11)						
				£263,117	4	0

By sect. 113 (3) a reference to the Auditor's report should be inserted at the foot of the balance sheet. *See* next page.

LIMITED.
31st December, 1909.

ASSETS.

	£	s.	d.	£	s.	d.
By Goodwill, Trade Marks, and Patents, as per last Balance Sheet				58,987	16	5
,, Freehold Property, as per last Balance Sheet	8,584	7	6			
,, Amount expended during year	13	13	2	8,598	0	8
,, Leasehold Property, as per last Balance Sheet	1,648	8	2			
Less Written off for Depreciation (d) ...	226	3	11	1,422	4	3
,, Fixed Plant and Machinery at Homerton, as per last Balance Sheet	2,324	6	4			
Amount expended during the year ...	389	8	3			
	2,713	14	7			
Less Written off for Depreciation (d) ...	581	1	7	2,132	13	0
,, Tools and Stores at Homerton				247	4	6
,, Fixtures, Fittings, Furniture, and Plant, at Queen Victoria Street, Upper Thames Street, and at Shops as per last Balance Sheet	4,891	18	3			
Expended during the year	39	4	1			
	4,931	2	4			
Less Written off for Depreciation ...	360	4	8			
	4,570	17	8			
,, Fixtures at Montreal, New York, and Shanghai, *less* written off for Depreciation	888	15	8			
,, Fixtures and Plant at Glasgow, *less* written off for Depreciation	104	5	1			
,, Fixtures at Homerton, *less* written off for Depreciation	326	6	2	5,890	4	7
,, Travellers and Warehouse Plant, *less* written off for Depreciation				577	14	10
,, Silver Mounters' Plant, *less* written off for Depreciation ...				147	3	8
,, Investments at middle quoted prices, December 31st, 1909				580	11	3
,, Bills Receivable				8,117	2	4
,, Sundry Debtors	80,969	2	2			
Less Reserve for Discounts ...	1,344	18	0	79,624	4	2
,, Amount due by H.M. Customs				8	2	4
,, Advance on Leases				900	0	0
,, Suspense Account of amount paid in anticipation at shops, Shanghai and New York				60	19	9
,, Stock as per Inventories at London and Glasgow (certified by Managing Directors) and at Shanghai, Montreal, and New York				93,196	17	2
,, Goods in Transit for Shanghai				105	4	4
,, Cash. At Bankers				2,125	13	11
In hand				395	6	10
				£263,117	4	0

PROFIT AND LOSS ACCOUNT,

	£	s.	d.	£	s.	d.
To Directors' Fees and Managing Directors' Remuneration (g)	2,500	0	0			
,, Auditors' Fees	210	0	0			
,, Pensions	130	18	0			
				2,840	18	0
,, Interest	...		...	7	17	1
,, Balance carried down (h)	...		...	9,974	8	8
				£12,823	3	9

	£	s.	d.
To Dividend at 5½ per cent. per annum on Preference Shares (i)	6,765	0	0
,, Debenture Interest (i)	306	3	5
,, Amount transferred to Reserve (i)	1,000	0	0
,, Balance carried to Balance Sheet (j)	3,397	12	8
	£11,468	16	1

Auditors'

(k) *We report to the Shareholders that we have obtained all the information above Balance Sheet and Profit and Loss Account with the Books and Vouchers and that in our opinion the Balance Sheet is properly drawn up so as to exhibit to the best of our information and the explanations given to us, and as shown*

LONDON, 14*th March*, 1910.

Year ended 31st December, 1909.

	£	s.	d.
By Profit on Trading after providing for Bad and Doubtful Debts and Depreciation of Leases, Plant, and Machinery (f)	12,784	2	0
NOTE—The sum of £16,000 written off an exceptional Bad Debt has been provided by the Voluntary Surrender of 8,000 Preference and 8,000 Ordinary shares by the Chairman and Managing Directors of the Company			
,, Transfer Fees	8	19	6
,, Profit on Sale of Investments, less loss on purchase ...	30	2	3
	£12,823	3	9

	£	s.	d.
By Balance brought down	9,974	8	8
,, ,, ,, from last year ... £4,494 7 5			
Less Dividend for the year 1908 on the Ordinary Shares at the rate of 6% ... 3,000 0 0			
	1,494	7	5
	£11,468	16	1

Directors.

Report.

and explanations we have required, that we have examined and compared the in London and the audited statement from Montreal, New York, and Shanghai, a true and correct view of the Company's affairs at 31st December last, according by the Books of the Company.

Auditors.

The following points should be specially noted:

In order to show what profit has been made in the year, the amount of capital subscribed must be shown. See item (a). If it can be shown that the assets amount to more than this sum, the balance is profit. Besides the subscribed capital, any moneys paid to reserve funds, etc., in previous years must be accounted for (see item (b)), and debts owed by the company must also be deducted from the assets. See item (c).

On the other side is set out the value of the assets. Notice that deduction is made, in the case of the leaseholds and plant, for depreciation. See item (d). As the assets exceed the liabilities, the balance is written under the latter head. See item (e). So much for the capital account.

The same profit is arrived at in the **profit and loss** account (p. 220).

The total amount of the trading profit for the year is stated. See item (f). From this are deducted directors' fees, etc. (see item (g)), leaving a balance (item (h)). Out of this are paid dividends on preference shares, interest on debentures, and amounts put by as reserve for the year (items (i)), and the balance (j) is profit which may be divided among the shareholders by declaring a dividend of (say) 5 per cent. on the ordinary shares, leaving a balance to be carried over to the next year.

SECTION 2.

Auditors.

The Articles usually provide for the appointment of auditors and the auditing of the accounts of the company. But apart from any such provision, the Companies Act provides as follows:

An auditor is to be appointed at the general meeting of the company: if not, the Board of Trade may appoint (*e*).

A director cannot be an auditor.

(*e*) S. 112.

The auditors are entitled to have access to the books and papers of the company, and may require all necessary information and explanations from the officers of the company.

But the court will not always order the company to produce its books to the auditors, *e.g.*, if there is a dispute between the company and the auditors, and it is not proved that the company intends to continue their appointment as auditors (*f*).

The auditors must make a report stating whether they have obtained all the information and explanations they have required, and whether the balance sheet is properly drawn up (see item (k)). The balance sheet must be signed by two directors. The auditors' report must be attached to or referred to in the balance sheet and must be **read before the company in general meeting.** Members are entitled to inspect the report and take copies (*g*).

Duties of Auditors (see notes (*h*) below).—The auditor's duty is

(1) To **make himself acquainted with his duties** under the company's Articles and **under the Companies Act** (*i*).

But he is not bound to be a legal expert (*i*).

(*f*) *Cuff* v. *London & County Land Co.*, [1912] 1 Ch. 440.
(*g*) S. 113.

(*h*) *Notes of Cases on the Duty of Auditors* (*a*).

(*i*) *Republic of Bolivia Exploration Syndicate, Ld.*, [1914] 1 Ch. 139. The company's Memorandum provided for payment of underwriting commissions. Their Articles incorporated Table A (1906), which does not provide for payment of such commissions and also does not expressly permit a director to contract with the company. The company paid certain sums for underwriting commission and also paid profit costs to one of its directors who was a solicitor. The auditor passed these items in the balance sheets,

(*a*) These notes are intended for the use of accountants and others specially interested in this question.

(2) To see that the books show the true financial position of the company.

(3) To report all material points to the shareholders.

Newton v. Birmingham Small Arms Co., Ltd., [1906] 2 Ch. 378.

The directors resolved to create a secret reserve fund, the existence and purposes of which were not to be disclosed by the auditors to the company:—**Held**, the resolution was bad, as the auditors would be bound to disclose the facts.

He must be honest and must exercise reasonable care; otherwise he may be sued for damages. **It is not his duty to give advice,** and he has nothing to do with the way in which the business is carried on (*k*); nor is he bound to be a detective, but is justified in believing tried servants of the company and in assuming that they are honest, provided he

relying on the power given in the Memorandum, and knowing that the solicitor was not a director when the company was formed, and their legality had been discussed at a meeting of shareholders, who had subsequently approved the balance sheet.

Held, "Auditors of a limited company are bound to know and make themselves acquainted with their duties under the Articles of the company whose accounts they are appointed to audit, and under the Companies Acts for the time being in force; and when it is shown that audited balance sheets do not show the true financial condition of the company and that damage has resulted, the onus is on the auditors to show that this is not the result of any breach of duty on their part." In the special circumstances of this case the auditor was not liable; but the court, not being entirely satisfied with the way the audit was conducted as regards the payments to the director, dismissed the summons without costs.

(*k*) *Re London General Bank* (*No.* 2), [1895] 2 Ch. 673. The greater part of the capital of the company was advanced on loan to the Liberator and other Balfour companies upon securities which were insufficient and difficult to realise. For several years the auditors pointed out to the directors the unsatisfactory nature of these securities; but the auditors' report to the members on the balance sheet only stated that "the value of the assets as shown on the balance sheet is dependent on realisation." On the faith of this

takes reasonable care (*l*). On the other hand, **if there is anything calculated to excite suspicion he should probe it to the bottom** (*l*), and he must not confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but should ascertain by comparison with the books of the company that it was properly drawn up so as to show the correct financial position (*m*).

The auditor should see that the moneys and securities of the company are actually in the possession of the company, or have been deposited for safe custody with a bank or in other proper custody.

An auditor has been held not to be justified in accepting a certificate of the company's brokers that they held certain securities on behalf of the company (*mm*).

balance sheet dividends were declared, which were really paid out of capital:—**Held**—(1) It was nothing to the auditor whether the business of the company was being conducted prudently or imprudently, profitably or unprofitably, . . . provided he discharged his own duty to the shareholders. (2) His duty was to ascertain the true financial position of the company and to report to the shareholders. The auditors had failed in this, and were liable.

(*l*) *Re Kingston Cotton Mill Co.* (*No.* 2), [1896] 2 Ch. 279. The value of the company's stock-in-trade was grossly overstated for several years in the balance sheets, and the directors were thus enabled to pay dividends out of capital. The auditors accepted the certificate of the manager (a business man of high repute) as to the value of the stock. The auditors did not examine the books; if they had done so, and had added to the value stated in the previous year the amount spent on stock and deducted the amount received from sales, they would have seen that the valuation required explanation:—**Held**, the auditors were not liable: it was no part of their duty to take stock.

(*m*) *Leeds Estate Co.* v. *Shepherd* (1887), 36 Ch. D. 787. The Articles provide that the Directors should receive remuneration only if the dividends exceeded 5 per cent. The manager prepared a delusive balance sheet, which enabled the directors to declare dividends of over 5 per cent. and pay themselves their remuneration. The auditor did not look at the Articles or at the books of the company, but accepted the statement of the manager, and certified the accounts "to be a true copy of those shown in the books of the company." The dividends were in fact paid out of capital:—**Held**, the auditor was liable.

(*mm*) *City Equitable Fire Insurance Co. Times Newsp.*, 23rd May, 1924.

An auditor, if formally appointed by the Articles or under section 152 of the Companies Act, is an "officer" of the company, and liable to be proceeded against for misfeasance under section 215.

But an auditor informally appointed is not such an officer.

Re Western Counties Bakeries Co., [1897] 1 Ch. 617.

The Articles provided for the appointment of auditors in general meeting. P. and R. were employed as auditors on two occasions, but were never formally appointed:—**Held**, they could not be made liable as "officers" of the company.

Where the articles provide that the auditors and other officers of the company are only to be liable in case of their own wilful default, it has been held that the liquidator cannot make them liable under sect. 215, unless the auditors knew that they were neglecting their duties (*n*).

Remuneration.—The remuneration of an auditor is fixed by the general meeting which appoints him, and is paid by the company (*o*).

Auditors are agents for the shareholders: but the shareholders are not necessarily bound by notice of everything of which notice is given to the auditors (*p*).

(*n*) *City Equitable Fire Insurance Co.*, *Times Newsp.*, 12th July, 1924. Possibly a creditor would be in a stronger position. *Re National Funds Assurance Co.*, 10 Ch. D. 118.

(*o*) Companies Act, s. 112 (7).

(*p*) *Spackman* v. *Evans*, L. R. 3 H. L. 196, 235.

CHAPTER XVII.

PRIVATE COMPANIES.

"**A private company**" is defined by the Companies Act to mean a company which by its articles

(a) restricts the right to transfer its shares;

(b) limits the number of its members (exclusive of persons who are or have been (*a*) in the employment of the company) to fifty; and

(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company (*b*).

Several joint holders of a share are for the purposes of this definition treated as one member (*c*).

The Act does not specify in what manner the right to transfer shares must be restricted. It is probably sufficient if the right is so restricted that the directors can prevent the number of members from being increased beyond fifty.

If a private company fails to comply with any of these provisions, it ceases to be entitled to the privileges of a private company. But the court may grant relief, if the default was due to accident, inadvertence or other sufficient cause (*d*).

Usually all the shares of a private company are held by a few persons, frequently members of the same family.

(*a*) Companies Act, 1913 (3 & 4 Geo. V. Cap. 25), s. 1 (2) (*b*).
(*b*) Companies Act, s. 121. (*c*) S. 121 (3).
(*d*) Companies Act, 1913, s. 1 (1).

It is often convenient for a person or partnership to turn their business into a private company. This is done by forming a private company and selling the business to the company. The consideration is usually the allotment of shares to the sellers of the business, credited as fully paid.

The result is to limit the liability of the former owner or members in case of loss and to make a division of profits and interests in the business more easy to accomplish.

Legally, the position of a private company is in most respects the same as that of a public company (*d*), and even if one member holds practically all the shares, the company is a distinct "being" or "person" (see *Salomon* v. *Salomon & Co., Limited,* ante, p. 6).

Thus the company is not bound by notice of matters which are in the knowledge of the one important member (see *The* "*Birnam Wood,*" [1907] P. 1).

It is sometimes difficult to say whether a company has issued **"an invitation to the public"** or not; but the test seems to be that the invitation must have been issued—

(1) by the company itself (*e*); and

(2) to any person who chose to apply for the shares, or to a considerable class of persons selected as being the most likely subscribers.

Sherwell v. Combined Incandescent Syndicate, Limited, [1907] W. N. 110.

The directors printed a thousand copies of a prospectus headed "Strictly private and confidential: not for publication," and some were distributed by the directors among their friends:—**Held,** this was *not* an invitation to the public.

(*d*) *E.g.* for purposes of apportionment of dividends. *Re White,* [1913] 1 Ch. 231.

(*e*) Thus in *Booth* v. *New Afrikander Co.*, [1903] 1 Ch. at p. 315, it was held that an offer by the liquidator of an old company, of shares in a new company, was not an offer to the public within s. 8 of the Act of 1900. And see *Burrows* v. *Matabele Gold Co.*, [1901] 2 Ch. 23.

South of England Natural Gas Co., Ld., [1911] 1 Ch. 573.

Prospectus headed "For private circulation only" but filed with the Registrar. 3000 copies sent out, but only to shareholders in certain gas companies:—**Held**, this *was* an invitation to the public.

Special provisions relating to private companies.

(1) **A private company may consist of two members only** (*f*).

(2) A private company must **send with the annual list and summary** required by sect. 26, **a certificate** signed by a director or the secretary that the company has **not issued any invitation to the public** to subscribe for shares or debentures, and, **if the number of members exceeds fifty, a certificate that the excess consists of members or past members** of the company (*g*).

(3) The annual summary need not include a balance sheet (*h*).

(4) No report need be sent to the members before the statutory meeting (*i*) (see p. 208).

But a private company must hold a statutory meeting (*k*).

(5) Directors need not file a consent to act or sign the Memorandum or a contract for their qualification shares (*l*) (see p. 193).

(6) **A statement in lieu of a prospectus need not be issued** even though no prospectus is issued (*ll*).

But a private company must issue a statement in prescribed form if it wishes to pay underwriting commission (*m*).

(*f*) Companies Act, s. 2.
(*g*) *Ibid.*, 1913, s. 1 (3).
(*h*) *Ibid.*, s. 26 (3).
(*i*) *Ibid.*, s. 65.
(*k*) *Gardner* v. *Iredale*, [1912] 1 Ch. 700.
(*l*) Companies Act, s. 72.
(*ll*) *Ibid.*, s. 82.
(*m*) *Ibid.*, s. 89 (1) (*b*); and see the prescribed form, W. N., 11th July, 1908, p. 223

(7) Shares may be allotted before the minimum subscription is subscribed (*n*).

(8) A private company **may commence business immediately it is incorporated** notwithstanding that the minimum subscription has not been subscribed and the directors have not paid the proper proportion on their shares (*o*).

(9) The holders of preference shares have no right to inspect balance sheets under sect. 114.

The **Articles of Association** of a private company usually contain special provisions (*p*), and for the purpose of obtaining the privileges of a private company should provide as follows:—

(1) **The transfer of shares should be restricted,** *e.g.* so that only members, or the sons or daughters, etc., of members, can become shareholders (*q*).

(2) The number of members (exclusive of employees and ex-employees) should be limited to 50.

(3) Invitations to the public to subscribe for shares or debentures should be prohibited.

(4) If it is intended to give some of the shares to employees, a provision is sometimes inserted that they must transfer their shares if they are dismissed. This is not now necessary since ex-employees are now excluded from the limit of 50 members (*r*).

(5) The vendor or chief member is often made

(*n*) Companies Act, s. 85 (7); and see p. 95, *ante*.
(*o*) *Ibid.*, s. 87 (5); and see p. 70, *ante*.
(*p*) See Palmer's Company Precedents, 12th edit., vol. i. p. 903, *et seq.*
(*q*) *Attorney-General* v. *Jameson*, [1904] 2 I. R. 644.
(*r*) Companies Act, 1913, s. 1 (2) (*b*).

governing director for life, and other directors are exempted from the rule which makes directors retire by rotation, etc.

(6) Share warrants should not be authorised.

Sometimes the company adopts table A as its Articles with modifications. This is, however, most inconvenient in practice, and it is better to adopt a short form of Memorandum and Articles complete in themselves.

A private company may **form itself into a public company** by—

(1) passing a special resolution,

(2) filing with the Registrar a statement in lieu of prospectus, and

(3) filing a statutory declaration in the form which it would have had to file before commencing business if it had been a public company (*s*).

The Articles will also probably require considerable alteration, since many matters of importance to a public company were probably omitted when the Articles were framed for a private company. In particular the Articles should fix a **minimum subscription.**

A "**Syndicate**" is the name usually given to a company composed of a few members formed for the purpose of exploring or investigating the value of some property and of selling it, if satisfactory, to a larger company.

Syndicates are usually limited companies, and may be either public or private.

(*s*) Companies Act, s. 121.

CHAPTER XVIII.

GUARANTEE COMPANIES.

A COMPANY limited by guarantee need not necessarily have any capital at all. Each member undertakes to contribute a certain sum if the company is wound up.

The Memorandum of Association therefore contains a declaration of this guarantee, but does not contain any statement as to the amount of capital. In other respects, the Memorandum and Articles are similar to those of a company limited by shares.

If the company is wound up, no contribution can be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company (*a*).

Past members are liable to be put on the "B" list (*b*).

If the company has a capital divided into shares, the amount of the capital and the number of shares must be stated in the Memorandum (*c*).

This provision was first made by the Companies Act, 1900. Consequently in case of a company registered after the Act of 1900, the capital cannot be altered without a change of the Memorandum, which requires the leave of the court, but if registered before the Act, it may be able to change its capital by merely changing the Articles.

If there is no capital, persons dealing with the

(*a*) Companies Act, s. 123 (1) (v).
(*b*) *Premier Underwriting Co.*, [1913] 2 Ch. 29.
(*c*) Companies Act, s. 4 (2).

company have very little security, as there is no liability on the members until the company is wound up, and by that time most of the members may have retired.

If there is no capital divided into shares, no person who is not a member can participate in the profits of the company, if it was registered after the 1st January, 1901 (*d*).

If there is a share capital, it may be reduced in the same way as in the case of a company limited by shares (*e*).

On an allotment of shares the provisions of s. 88 of the Companies Act as to a return of allotments and filing contracts do not apply.

If there is no capital divided into shares, sect. 66, which enables persons holding not less than one-tenth of the issued share capital of the company to requisition a general meeting, does not seem to apply.

(*d*) Companies Act, s. 21 (1). (*e*) *Ibid.*, s. 56.

CHAPTER XIX.

WINDING UP BY THE COURT.

If the members wish the company to come to an end, or if it becomes insolvent, or if for any other reason it becomes desirable that the company should cease to exist, it is wound up.

A company may be wound up in three ways:

(1) **Compulsory winding up by the court;**

(2) **Voluntary winding up;**

(3) **Winding up under the supervision of the court.**

Whichever way is selected, a liquidator or liquidators are appointed to administer the property of the company, and they must apply the assets of the company, first, in the payment of creditors in their proper order, and then in distributing the residue among the shareholders according to their rights.

A company cannot be made bankrupt.

Section 1.

When a company may be wound up by the court.

A company may be wound up by the court when (*a*)—

(1) the company has passed a special resolution (*b*) to wind up; or,

(*a*) Companies Act, s. 129. (*b*) See p. 214.

(2) default is made in filing the statutory report or holding the statutory meeting (*c*); or

(3) the company does not commence business within a year from its incorporation or suspends business for a year; or,

(4) the number of the members falls below seven (or in case of a private company below two); or

(5) the company is unable to pay its debts; or

(6) the court is of opinion that it is just and equitable, that it should be wound up.

As to (1).—A company may be wound up for any cause whatever if a sufficient number of members pass a special resolution that it shall be wound up.

As to (3).—The power of the court to wind up a company which has not carried on business for a year is discretionary, and will not be exercised unless there are indications that the company has no intention of continuing its business.

Re Capital Fire Insurance (1882), 21 Ch. D. 209.

A fire insurance company had commenced a considerable business in France within the year, and intended to commence in England so soon as sufficient capital should be subscribed. An order to wind up was refused.

A company will not be wound up because it has ceased to carry on one of several businesses, unless that business is the main object of the company.

Re Amalgamated Syndicate, [1897] 2 Ch. 600.

For facts, see p. 24.

A company which has amalgamated with another company cannot be wound up on the ground that it

(*c*) See page 208, *ante*.

has ceased to carry on business as a separate company (*d*). The Registrar may strike the name of a defunct company off the register (*e*).

As to (4).—A company is not often wound up by the court on the ground that the members are less than seven, because the **court will not usually make an order to wind up where there are very few members,** but will leave the company to wind up voluntarily.

As to (5).—**A company is deemed to be unable to pay its debts,—**

(1) if a creditor to whom the company owes £50 or more has served on the company a demand for payment, and the debt has not been paid within three weeks;

(2) if an execution on a judgment remains unsatisfied; or

(3) if it is proved to the satisfaction of the court that the company cannot pay its debts (*f*).

The court must take into account contingent liabilities and assets of the company (*g*); but otherwise may be satisfied by any evidence that it deems to be sufficient.

Re Globe Steel Co. (1875), L. R. 20 Eq. 337.

The company accepted a bill of exchange in part payment for goods bought. No demand had been made or execution levied. The bill was dishonoured:—**Held,** this was sufficient proof of insolvency.

A company may be wound up even when its assets

(*d*) *National Finance Co.* (1866), W. N. 243, 14 L. T. 749.
(*e*) Companies Act, s. 242.
(*f*) *Ibid.*, s. 130. (*g*) *Ibid.*, s. 130 (4).

are valuable, if they are locked up in investments and the company is being carried on at a loss.

Re Factage Parisien, explained (1867), L. R. 2 Ch. App., at pp. 746, 747.

The company was carrying on its business at a loss, and was paying its debts by making new calls on the members :—**Held,** the company may be wound up. "If they are carrying on business at a manifest loss, and **it is totally impossible to make any profit**, it can scarcely be said that this court will consider it just and equitable that the company should be allowed to continue when people who have embarked property to a considerable amount in it do not wish it to go on. . . . It is quite distinct from saying that it is an insolvent company, or that it cannot pay its debts, because the persons managing it will take care to have all the debts paid by making calls to meet them."

This will only be done on clear proof that the company cannot possibly make a profit.

If the company might ultimately make a profit by a change of management, a winding up order will not be made (*h*).

As to (6).—It was at one time held that the court could not wind up a company on the ground that it was "just and equitable," unless there was some cause similar to those mentioned in sub-ss. (1) to (4), but this doctrine is now practically disregarded (*Sailing-ship "Kentmere,"* W. N. (1897) 58). The court will not, however, make the order unless there is some special reason for doing so. Thus, general charges of fraud are not usually sufficient (*i*).

Re Medical Battery Co., [1894] 1 Ch. 444.

Serious charges were made against the manager Harness of defrauding the public. The company went into voluntary

(*h*) *Suburban Hotel Co.*, L. R. 2 Ch. 737.

(*i*) Fraud, if alleged, must be specifically proved, and it is not sufficient that it should appear in the statutory affidavit alone (*London & Hull Soap Works, Limited*, [1907] W. N. 254).

liquidation, but some creditors wanted to have it wound up by the court :—**Held,** fraud towards the outside world is no ground for compulsory winding up.

But where the whole object of the company was fraudulent, the company has been wound up.

Re T. E. Brinsmead & Sons, [1897] 1 Ch. 45, 406.

T. E. Brinsmead and two of his sons had been in the employ of the old firm of John Brinsmead & Sons. They started a company, and agreed to sell to this company the business and name of T. E. Brinsmead & Sons. They were restrained by an injunction from using the name Brinsmead on the ground of fraud. A petition for compulsory winding up was then presented : —**Held,** the company was initiated to carry out a fraud, and was hopelessly embarrassed by a lot of actions for fraud ; therefore it was just and equitable that it should be wound up.

A company may be wound up under this section for the purpose of defeating a reconstruction scheme which is prejudicial to the shareholders (*k*), or in case of a deadlock (*l*).

SECTION 2.

Who may Petition.

Winding up by the court is commenced by a petition to the court. **Either a contributory or a creditor may petition** or both together ; for the order is made for the benefit of all (*m*), and the court may in either case have regard to the wishes of the creditors and contributories (*n*).

1. **Petition by contributory.**—A contributory cannot petition unless he has held his shares for at least

(*k*) *Consolidated South Rand Mines, Limited,* [1909] 1 Ch. 491.
(*l*) *Yenidje Tobacco Co.,* [1916] 2 Ch. 426, and *American Pioneer Tobacco Co., Ld.,* [1918] I Ch. 556.
(*m*) Companies Act, s. 138.
(*n*) *Ibid.,* s. 145.

six months during the eighteen months preceding the petition, except where—

(1) he is an original allottee, or

(2) the shares have devolved on him through the death of a former holder, or

(3) the number of the members has become less than seven (or two in case of a private company).

A fully paid shareholder can petition; so can a member whose calls are in arrear; so can a contributory on the B list (*o*). Any provision in the Articles which deprives members of their right to petition is void. See pp. 117, 118 above.

The court is not bound to make the order on a contributory's petition, and may always **have regard to the wishes of the creditors and other contributories** (*p*).

The court may direct meetings of creditors or contributories to be held for the purpose of ascertaining their wishes, and must have regard to the value of the debt of each creditor and the voting rights of the contributories under the Articles (*q*).

The court will not order a winding up, if the interest of the petitioning contributory is very small, and the majority of the members do not wish the order to be made; or if the number of shareholders is very small:

Re Professional, etc., Building Society (1871), L. R. 6 Ch. 856.

Four members of a building society wished for compulsory winding up; the rest did not. The order was refused.

or if presented in bad faith.

(*o*) Buckley, 10th edit., p. 331.
(*p*) Companies Act, s. 145.
(*q*) *Ibid.*, s. 219.

Re Metropolitan Saloon Omnibus Co. (1859), 28 L. J. Ch. 830.

Certain creditors had brought a winding-up petition against the company, which was dismissed with costs. They then persuaded a shareholder to present a petition for the purpose of annoying the company: **Held,** the petition is *malâ fide* and bad.

But the court will generally make the order where there is anything which seems to require investigation.

Re Varieties, Limited, [1893] 2 Ch. 235.

The company was formed to build a music hall on land leased to the company by S. S was to build the hall. S. and his nominees held 3700 shares. The county council refused to sanction the plans. The holders of 3900 shares voted for a voluntary winding up and appointed the secretary as liquidator. 847 independent shareholders wanted a winding up by the court to inquire into the actions of S.:—**Held,** the conduct of S. may require investigation; the company must be wound up by the court.

Before 1907 it was held that a contributory must allege and prove that there are assets.

Now by sect. 141 (1) the Court must not refuse to make an order on the ground that there are no assets; but this section does not **entitle** a shareholder to have the company wound up, unless there is a case for investigation or other good reason for a compulsory order (*r*).

If the company does not file a report before the statutory meeting, or does not hold the meeting, a contributory may petition to wind up the company (*s*).

The fact that a voluntary winding up has commenced does not prevent a contributory or a creditor from obtaining a winding-up order if he is prejudiced

(*r*) *Kaslo-Slocan Mining Corporation, Limited,* [1910] W. N. 13; *Haycraft Gold Co.* (1900), 2 Ch. 230.

(*s*) Companies Act, ss. 129 and 137.

by the voluntary winding up (*t*) (see further p. 255, *post*).

2. **Petition by creditor.**

The court (except in special circumstances) **is bound to make the order to wind up** if the creditor can prove that he has an undisputed debt and any of the things have happened which are enumerated in s. 129 (see pp. 234, 235). And the burden of proving that there are assets does not lie on the creditor (*u*).

But the court may refuse to order a winding up, if the majority of creditors do not want it:

Re Ilfracombe Building Society, [1901] 1 Ch. 103.

All the creditors except C. agreed to accept 12*s.* 6*d.* in the pound. C. afterwards petitioned to wind up:—**Held,** the petition must be dismissed.

or if the order will do no good.

Before the Act of 1907 the court would refuse to make the order if there was nothing to wind up or no assets for the ordinary creditors (see *Re Greenwood & Co.*, [1900] 2 Q. B. 306).

But now "an order to wind up a company shall not be refused on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, **or that the company has no assets**" (*x*).

And even before the Act the court has made the

(*t*) Companies Act, s. 197, and see *National Electricity Co.*, [1902] 2 Ch. 34.
(*u*) *Re Krasnapolsky Co.*, [1892] 3 Ch. 174.
(*x*) Companies Act, s. 141. *Re Clandown Colliery Co.*, [1915] 1 Ch. 369.

order in special circumstances, though there was probably nothing for the unsecured creditors.

Re Alfred Melsom & Co., [1906] 1 Ch. 841.

The debenture-holders were carrying on business in the name of the company, but no receiver had been appointed. There was no proof that there would be anything for the other creditors:—**Held,** even if there is nothing for the ordinary creditors it may be "just and equitable" that the company should be wound up—for they are obtaining credit from persons whose rights may be swallowed up at any moment by the debenture-holders (*y*).

The court is not bound to make the order at once; but may direct the petition to stand over for a time.

Re Brighton Hotel Co. (1868), L. R. 6 Eq. 339.

The shareholders were getting up a subscription to pay off the immediate debts and were going to appoint new directors and cut down the expenses:—**Held,** the petition must stand over for four weeks to allow this to be done.

A creditor whose debt is disputed on some substantial ground cannot generally get a winding-up order. The court may either order the petition to stand over until the validity of the debt can be determined or may dismiss the petition, and may even restrain the creditor by injunction from bringing a threatened petition.

Niger Merchants' Co. v. Capper (1877), 18 Ch. D. 557 n.

C. claimed £500 from the company for services. The company said they owed C. £260 only and had a set-off for this. C. then threatened to wind up the company if he was not paid. The company was solvent:—**Held,** injunction granted to restrain C. from bringing the petition.

An injunction can also be obtained to prevent the advertising of a winding-up petition (*re A. Company*, [1894] 2 Ch. 349).

(*y*) See as to the position of creditors in this case, *London Pressed Hinge Co.*, [1905] 1 Ch. 576, and for cases in which a similar order was made, *Re Chic, Limited*, [1905] 2 Ch. 345; and *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327.

But the court will sometimes decide the validity of the debt forthwith.

Re Imperial Silver Quarries Co. (1868), 16 W. R. 1220.

J. sold a silver mine to the company for shares and debentures. The principal secured by the debentures was repayable out of profits. J. sold six debentures to A. One and a half years' interest became due, but there had been no profits. A. petitioned to wind up the company. The company disputed A.'s claim on the ground that the interest was payable out of profits only:— **Held**, this was not a very substantial dispute, and depended only on the construction of the debentures; the court decided that A.'s claim was good and made the order to wind up.

A debenture-holder may petition if the principal sum is payable to the debenture-holders direct, but **not** if it is payable to the trustees of a debenture trust deed (*Re Uruguay Central Rail. Co.* (1879), 11 Ch. D. 372) (*z*), and the order has been refused where the debenture-holders had power to appoint a receiver, and had not done so (*a*).

The assignee of a debt can petition, and so can the assignee of part of a debt (*aa*), but not a creditor of a third party who has, by means of a garnishee order, attached a debt due from the company to the third party.

A creditor who has commenced a petition cannot sell his debt and the right to carry on the petition (*Re Paris Skating Rink* (1877), 5 Ch. D. 959).

A creditor whose claim is contingent or prospective can petition on giving security for costs (*b*), and on showing that a prima facie case for winding up has arisen.

(*z*) *Re Dunderland Co., Limited*, [1909] 1 Ch. 446 (Debenture Stock holder).
(*a*) *Re Exmouth Dock Co.* (1873), L. R. 17 Eq. 181.
(*aa*) *Re Steel Wing Co., Ld.*, [1921] 1 Ch. 349.
(*b*) Companies Act, s. 137 (1) (c).

British Equitable Bond, etc., Limited, [1910] 1 Ch. 574.

The holder of an insurance policy which had not matured presented a petition. **Held**, he can petition.

A creditor whose claim is unliquidated cannot petition; he must first get a judgment fixing the amount of the debt. The creditor's **debt need not amount to £50**; but the court will not usually make a winding-up order if the petitioning creditor's debt is small. The £50 mentioned in s. 130 (see p. 236) is usually regarded as suggesting the minimum amount, and if the total amount of the debts due to the petitioning (*c*) creditors and those supporting the petition is less than £50 the court will not make the order unless there are special circumstances (*d*).

Where the company refused to pay the debt because it was thought to be too small to support a winding-up petition, the court made a compulsory order (*re World Industrial Bank, Limited*, [1909] W. N. 148).

The Official Receiver can petition for a compulsory winding up after a voluntary winding up has commenced (*e*).

A husband who is a contributory in respect of his wife's shares can present a petition (*f*).

The winding-up order operates for the benefit of all creditors and contributories (*g*).

An action will lie for maliciously presenting a winding-up petition.

Quartz Hill Co. v. Eyre (1883), 11 Q. B. D. 674.

Held, no special damage need be proved, "for the presentation of the petition is from its very nature calculated to injure the credit of the company."

(*c*) *Re Leyton Cycle Co.*, [1901] W. N. 225.
(*d*) *Re Industrial Assurance Association*, [1910] W. N. 254.
(*e*) Companies Act, s. 137 (1). (*f*) S. 137 (3). (*g*) S. 138.

SECTION 3.

What companies can be wound up by the court.

The court may wind up a **foreign company** if the management is conducted in England, but not otherwise.

Re Commercial Bank of India (1868), L. R. 6 Eq. 517.

The company was formed, incorporated and had its principal place of business in India. It had a branch office in England:— **Held,** it may be wound up in England.

Unregistered companies can be wound up.

E.g., an unregistered Friendly Society (*h*).

An **illegal** society cannot be wound up by the court (*i*).

SECTION 4.

Procedure on winding up by court.

Proceedings to enforce winding up are commenced by petition, which is somewhat similar in form to the petition on p. 134, and is supported by an affidavit of the petitioner (*j*).

If the capital of the company paid up or credited as paid up is not more than £10,000, the petition may be presented in the county court; if more, in the High Court.

The court may either—

(1) dismiss the petition with or without costs; or

(2) order it to stand over (see p. 242); or

(3) make an order for winding up under supervision of the court (see p. 257); or

(*h*) *Re Victoria Society*, [1913] 1 Ch. 167.
(*i*) *Re Padstow Assurance Association*, 20 Ch. D. 137.
(*j*) The affidavit of some other person will be accepted if there is reason for so doing (*Re African Farms, Limited*, [1906] 1 Ch. 640).

(4) make a compulsory order for winding up the company; or

(5) make any other order that may be just.

If the order is made to wind up compulsorily, the court appoints a liquidator and may settle the list of contributories, make calls, etc., but these powers are now usually exercised by the liquidator. If a contributory is dead, the court may order that his estate be administered by the court.

The winding-up dates from the presentation of the petition (*k*), except for the purpose of preferential payments (see p. 265), when it dates from the order (*l*).

Persons entitled to be heard on the hearing of the petition are (1) the company; (2) any creditor; (3) any contributory.

The liquidator may apply to the court to determine any question arising in the winding up (*m*).

Questions arising in the winding up can, with certain exceptions, be heard by the registrar (*n*). An appeal from his decision lies to the judge (*Re Pretoria Pietersburg Railway Co.*, [1904] 2 Ch. 170). Questions between the company and persons who are not members of the company, *e.g.* vendors, cannot be tried in this way (*o*).

The petition must be presented at the registrar's office and must be advertised in the London *Gazette* and one other London or local paper, or as the registrar shall direct (*p*).

A slight mistake in the form of the advertisement will not invalidate the proceedings (*q*).

A copy of the winding-up order, when made, must be forwarded to the registrar (*r*).

(*k*) Companies Act, s. 139.
(*l*) *Ibid.*, s. 209.
(*m*) *Ibid.*, s. 158 (3).
(*n*) Winding-up Rules, 1909, r. 5.
(*o*) *Centrifugal Butter Company*, [1913] 1 Ch. 188.
(*p*) Winding-up Rules, 1909, r. 27.
(*q*) *Re Saul Moss & Sons, Limited*, [1906] W. N. 142.
(*r*) Companies Act, s. 143.

When a winding-up order has been made, the secretary and one of the directors must make out and submit to the Official Receiver within fourteen days a statement verified by affidavit showing the assets, debts and liabilities of the company with a list of creditors and their securities (*s*). The statement is open to the inspection of creditors and contributories on payment of a fee. A person making this statement is entitled to his costs out of the assets, provided he obtains the sanction of the Official receiver before incurring them (*t*).

The Official Receiver after receiving this statement reports to the court as to the assets and liabilities of the company, the causes of failure and whether inquiry is desirable. He may also point out any suspicious or fraudulent circumstances with a view to a public examination (*u*).

Costs.—If the petition is successful, the petitioner's costs are a first charge on the assets of the company available for the ordinary creditors; *e.g.*, **not** on property over which debenture-holders have a claim.

A person who lodges a second petition when one is already presented, may have to pay the costs.

Two companies cannot be wound up by the same order.

The court may stay the proceedings in the winding up, if they ought to be stayed for any reason (*x*).

Appeal lies to the court of appeal (*y*).

When the affairs of the company are completely wound up, the **court makes an order that the company be dissolved.** The liquidator must report this order to the registrar, who makes an entry in the register that the company is dissolved (*z*). The com-

(*s*) Companies Act, s. 147 (penalty £10 per day).
(*t*) W. U. Rule 54.
(*u*) Companies Act, s. 148.
(*x*) Companies Act, s. 144.
(*y*) Security for costs must be given if the company appeals, *Consolidated South Rand, Limited*, 1909, W. N. 66.
(*z*) Companies Act, s. 172 (penalty £5 per day).

pany then ceases to exist. **Leases held by the company come to an end** (*a*), **and freehold land held by the company reverts to the grantor** (*b*). Any chattels of the company that may happen to remain become vested in the Crown as *bona vacantia.*

Re Taylor's Agreement Trusts, [1904] 2 Ch. 737.

The liquidator of a company agreed to sell letters patent to A., but the company was dissolved before the patent was assigned to A.:—**Held,** the patent was vested in the Crown.

The Crown is not bound by trusts, and therefore does not become a trustee of such chattels for the purchaser; but it appears that a new trustee of the property may be appointed (*c*) and a vesting order made under section 35 of the Trustee Act, 1893 (*d*), or the assets may be distributed by the liquidator if the attorney-general consents on behalf of the Crown (*e*).

When a company has been dissolved, the court may within two years on the application of the liquidator or any person interested make an order declaring the dissolution to have been void (*f*).

Proceedings can then be taken as if the company had not been dissolved. The person who obtains the order must file an office copy of the order with the registrar within seven days (*e*).

(*a*) *Hastings Corporation* v. *Letton*, [1908] 1 K. B. 378. The reversioner should be made a party to any proceedings. *Re Albert Road*, [1916] 1 Ch. 289.

(*b*) *Hastings Corporation* v. *Letton, ubi supra*, at p. 384. *Co. Lit.* 13 B. It may be that this rule has been altered by the Law of Property Act, 1922, as it depended partly on the theory that a corporation holds an estate for the life of the corporation. 1 Blackst. 484.

(*c*) *Re* 9, *Bomore Road*, [1906] W. N. 16.

(*d*) *Re General Accident Assurance, Limited*, [1904] 1 Ch. *Re Ruddington Land Co.*, [1909] 1 Ch. 701; *Re Dutton's Patent*, [1923] W. N. 64.

(*e*) *Re Henderson's Nigel, Ltd.*, [1911] W. N. 159.

(*f*) Companies Act, s. 223.

Spottiswoode Dixon & Hunting, Ld., [1912] 1 Ch. 410.

The S. company held shares in the A. company which were not fully paid.

In 1909 the S. company was wound up for the purposes of reconstruction and a new company took over its assets and liabilities. The A. company had no notice of the liquidation.

In 1911 the A. company made a call on the shares, which the new company refused to pay:—**Held,** the A. company was a "person interested," and the dissolution of the S. company was declared void.

A winding-up petition can only be withdrawn subject to the power of the court to substitute another creditor or contributory as petitioner (*g*).

For the effect of a winding-up order see Chapter XXII.

(*g*) Winding-up Rules, [1909] r. 36.

CHAPTER XX.

VOLUNTARY WINDING UP.

THE object of a voluntary winding up is that the company and its creditors shall be left to settle their affairs without coming to the court, but to provide them with every facility for applying to the court if necessary.

SECTION 1.

How and when a Company may be Wound up voluntarily.

There are three possible ways of winding up voluntarily. Each way requires a different form of resolution.

A company may be wound up voluntarily when (*a*)—

(1) the period fixed for the duration of the company has come to an end, **or** an event upon which the company is to be wound up has happened **and** the company has in general meeting passed an **ordinary resolution** to wind up; or

(2) the company has (for any cause whatever) passed a **special resolution** (*b*) to wind up voluntarily; or

(*a*) Companies Act, s. 182. (*b*) See p. 214.

(3) the company has passed an **extraordinary resolution** that it cannot by reason of its liabilities carry on its business, and that it is expedient that the company be wound up.

As to (1).—A company can only be wound up by ordinary resolution if it is bound to cease under the terms of its regulations.

As to (2).—The company may be wound up by special resolution for any reason, even if it is flourishing.

As to (3).—Where a company is to be wound up by extraordinary resolution, the notices calling the meeting must state that it is proposed to wind up the company because its liabilities prevent it from carrying on its business.

Re Silkstone Fall Colliery Co. (1875), 1 Ch. D. 38.

Notices were sent out of a meeting "to pass a resolution for the voluntary winding up of the company, if it should be determined to do so." An extraordinary resolution was passed for winding up:—**Held,** the notices were bad, as they did not specify that it was to be wound up for this reason.

A voluntary winding up dates from the passing of the resolution which authorises it (*c*). In case of a special resolution it dates from the second or confirmatory resolution.

Effect of voluntary winding up (*d*).

(1) **The company ceases to carry on its business** except for the purpose of beneficial winding up.

(2) **Transfers of shares are void** except with the sanction of the liquidator.

(*c*) Companies Act, s. 183.
(*d*) *Ibid.*, ss. 184, 186 and 205.

Taylor's Case, [1897] 1 Ch. 298.

After winding up T. transferred his shares to P., and P. transferred them to R. with the consent of the liquidator:—**Held,** the transfers were good. R. must be put on the A. list and T. and P. on the B. list of contributories.

Transfers of shares made *bonâ fide* between the first and second meeting (in case of a special resolution to wind up) are good (*e*).

Debentures may be transferred (*e*).

(3) **Alterations in the status of members are void.**

Costello's Case (1869), L. R. 8 Eq. 504.

Special resolution to wind up passed August 7th. C. transferred his shares to an infant Q. on August 14th. Resolution confirmed August 23rd. The infant reached full age in October. The infant then confirmed the transfer:—**Held,** the transfer was void. Q. was an infant at the date of the winding up, and therefore cannot change his status so as to become capable of ratifying after the winding up.

(4) **The corporate state and powers of the company continue.**

SECTION 2.

Proceedings on Voluntary Winding up.

(1) Notice of the special or extraordinary resolution to wind up must be advertised in the *London Gazette* (*f*).

(2) (*g*) The property of the company is applied first in satisfaction of the liabilities of the company

(*e*) Buckley, 10th ed., p. 462.
(*f*) Companies Act, s. 485.
(*g*) Companies Act, s. 186.

pari passu; and subject thereto is distributed among the members.

(3) **A liquidator is appointed by the company** in general meeting, and thereupon the powers of the directors cease, unless continued by the sanction of the company in general meeting or of the liquidator (*h*).

(4) The liquidator may, without leave of the court, exercise all the powers of a liquidator appointed by the court. (See p. 277, *post.*)

(5) The liquidator settles the list of contributories, and his list is *primâ facie* evidence of their liability (*i*).

(6) The liquidator must call a meeting of creditors within seven days (*k*).

(7) The liquidator **must pay the debts of the company** and settle the rights of the contributories *inter se.*

If he fails to do so, the creditor or contributory who is not paid can apply to the court under section 193 of the Companies Act; but he cannot claim payment from the liquidator personally either under this section (*l*) or by an action commenced by writ (*m*); but if the liquidator has destroyed the remedy of the creditor or contributory by allowing the company to be dissolved or (possibly) by parting with all its assets, the liquidator becomes personally liable.

Pulsford v. Devenish, [1903] 2 Ch. 625.

The liquidator **negligently** omitted to pay one of the creditors of the company. The company was wound up and ceased to exist:—**Held,** the liquidator was still under his statutory liability to pay the debts, and must pay the plaintiff out of his own pocket.

(*h*) Companies Act, s. 186 (iii).
(*i*) Companies Act, s. 186 (vi).
(*k*) Companies Act, s. 188.
(*l*) *Hall's Waterfall Co.*, [1896] 1 Ch. 947.
(*m*) *Knowles* v. *Scott*, [1891] 1 Ch. 717.

Arrangements by a company with its creditors can be made as follows :—

A. Under section 191, in the course of voluntary liquidation. The arrangement is binding :—

(i) On the company, if sanctioned by an extraordinary resolution ;

(ii) On the creditors if acceded to by three-quarters in number and value of the creditors (*o*).

but subject to appeal to the court (*p*).

B. Under section 120, whether the company is being wound up or not.

The court may for this purpose call a meeting of creditors or members, and may declare the arrangement binding, if it is confirmed by a majority in number representing three-fourths in value of the creditors or members present (in person or by proxy) at the meeting (*q*).

Sometimes one class of shareholders (or creditors) is affected more or less than another class. If so, separate meetings of each class affected by the arrangement must be held.

Re Tea Corporation, Limited, [1904] 1 Ch. 12 at p. 23.

On the winding up, the assets were not sufficient to leave anything for the ordinary shareholders. An arrangement was made ; the preference shareholders and creditors voted for it ; but the ordinary shareholders voted against it :—**Held**, as the ordinary shareholders had no interest in the assets, their dissent did not matter (*r*).

(*o*) Companies Act, s. 191 and see s. 120. As to what is a class see *United Provident Assurance Company*, [1910] 2 Ch. 477.

(*p*) Companies Act, s. 191. (*q*) *Ibid.*, s. 120.

(*r*) The dissentient ordinary shareholders were held to be bound by the arrangement, probably because the *Company* was bound under the words of the section. But on the wording of the section it appears that a dissentient class of *creditors* cannot be bound by such an arrangement, even if they have no apparent interest in the assets. *E.g.* where second debenture holders do not approve the scheme, they are not bound by it, even if the assets are insufficient to pay the first debentures in full.

An arrangement can be made though there is no dispute to compromise (*s*).

The liquidator or any creditor or contributory may apply to the court (*t*) as in a winding up by the court, and the jurisdiction of the court is generally much the same as on a winding up by the court.

The liquidator may summon general meetings of members, and **must** do so at the end of every year of the winding up, and make a report to the members (*u*).

When the affairs of the company are fully wound up, the liquidator prepares an account, **calls a general meeting** (called "the final meeting") and lays the account before the meeting. Notice of this meeting is given to the registrar, and **after three months the company is deemed to be dissolved** (*x*), and ceases to exist (*y*).

If after the meeting it becomes desirable to keep the company alive for more than the three months, this may be done by an order deferring the date of dissolution (*yy*), or the dissolution may be declared void (*z*).

The costs of a voluntary winding up are payable first out of the assets (*a*).

A **creditor has a right to a winding up by the court in spite of a voluntary winding up** having commenced: but the court will not make the order unless it thinks that the **creditor's rights are prejudiced** by the voluntary winding up (*b*), or unless **the**

(*s*) *Guardian Assurance Co., Ld.*, [1917] 1 Ch. 431.
(*t*) Companies Act, s. 193.
(*u*) Companies Act, s. 194. (*x*) *Ibid.*, s. 195.
(*y*) *Re Westbourne Grove Drapery Co.*, W. N. (1878), 195. But the winding up is not deemed to be concluded if any assets of the company remain undistributed in the hands of the liquidator, until they have been distributed or paid into the Liquidation Account at the Bank of England. W. U. Rule 188.
(*yy*) Sect. 195 (4). An office copy of the order must be filed within 7 days.
(*z*) Companies Act, s. 223. (*a*) *Ibid.*, s. 196. (*b*) *Ibid.*, s. 197.

general body of creditors claim a winding up by the court (*Re Bishop & Son*, [1900] 2 Ch. at p. 258).

The court will not as a rule upon the petition of a contributory make an order for compulsory winding up after a voluntary winding up has commenced, unless—

(1) the voluntary winding up is fraudulent; or

(2) there are circumstances of suspicion; or

(3) a searching investigation is needed.

But the court has a discretion and has power to make the order whenever the contributory would be prejudiced by a voluntary winding up (*c*).

Re National Company for Distribution of Electricity, [1902] 2 Ch. 34.

After voluntary winding up commenced, some fully paid shareholders presented a petition for compulsory winding up, though there were ample assets, on the ground that some of the directors had received presents:—**Held,** a compulsory order may be made on the petition of fully paid shareholders, where there are surplus assets, and even though there is no fraud. But not in this case, as it would not bring anything to the shareholders.

If the court makes an order for compulsory winding up after a voluntary winding up has commenced, this does not make the proceedings under the voluntary winding up void, and the court may adopt all the previous proceedings (*d*).

In such a case the winding up dates from the resolution for purposes of preferential payments (*Re Havana Exploration Co.*, [1916] 1 Ch. 8); but for purposes of fraudulent preference the presentation of the petition corresponds with the presentation of the bankruptcy petition (*e*).

(*c*) Companies Act, s. 197. (*d*) *Ibid.*, s. 198.
(*e*) *Russell Hunting Record Co.*, [1910] 2 Ch. 78.

CHAPTER XXI.

WINDING UP UNDER SUPERVISION OF THE COURT.

When a special or extraordinary resolution has been passed to wind up voluntarily, the court may order that the winding up shall proceed under the supervision of the court, or a creditor may petition that the company be wound up under the supervision of the court (*a*).

The effect is that the liquidator may exercise all his powers without the sanction of the court as in a voluntary winding up, but subject to such restrictions as the court may direct.

The court has a discretion, both as to whether the order shall be made, and as to the amount of restriction that shall be imposed on the liquidator.

Re Watson & Sons, [1891] 2 Ch. 55.

Held, the court has power by restrictions imposed on the voluntary liquidator, almost to turn a voluntary liquidation into liquidation by the court, or it may relax the restrictions according to the requirements of each case.

In these respects the court may have regard to the wishes of the creditors and contributories (*b*).

(*a*) Companies Act, s. 199. This section does not apply to a winding up commenced by ordinary resolution.
(*b*) *Ibid.*, s. 201.

The effect of the order is the same as an order for compulsory winding up, except that the following sections do not apply (*c*).

Section 147, which requires a statement of the company's affairs to be submitted to the Official Receiver.

Section 148, which requires the Official Receiver to make a report to the court.

Section 149 (sub-sects. 1 to 9), relating to the appointment of liquidators by the court. (Sub.-sect. 10, making the acts of a liquidator valid in spite of any defect in his appointment, applies to a winding up under supervision.)

Section 152, requiring the Official Receiver to summon meetings of creditors and contributories.

Section 153, requiring the liquidator to give information to the Official Receiver.

Section 154, requiring payment of the moneys in the hands of the liquidator into the Bank of England.

Sections 155 and 156, requiring the liquidator to send accounts to the Board of Trade and to keep proper books.

Section 157, as to the release of the liquidators.

Sections 158 and 159, as to the control of the liquidator by the meetings of creditors and the Board of Trade.

Sections 160 and 161, as to committee of inspection and special managers.

Section 162, as to the appointment of the Official Receiver to be receiver for debenture-holders.

Section 173, as to making rules for the conduct by the liquidator of the powers of the court.

Section 175, providing for the public examination of promoters, directors, or other officers of the company.

Since the Companies Act, 1900, gave creditors power to apply to the court in a voluntary winding up, the chief reason for ordering a winding up under supervision has gone. But the order is still sometimes made.

(*c*) Companies Act, s. 203.

Advantages.

(i) Section 142 applies, and no proceedings can be commenced or continued against the company without leave of the court.

(ii) Section 144 applies, and the court may make an order staying proceedings in the winding up.

(iii) Section 202 applies, and the court may appoint an additional liquidator.

(iv) The order provides that no costs or remuneration shall be paid unless they are taxed or allowed by the registrar.

If a petition is presented for winding up under supervision, the court cannot make a compulsory order on the motion of a creditor (*d*); and if an order is made for winding up under supervision, a creditor cannot present a petition for compulsory winding up, but the official receiver may do so (*e*).

Dissolution.

This can only be done by an order of the Court under section 172, as this section is not excluded by section 203.

(*d*) *Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563.
(*e*) *Jubilee Sites Syndicate*, [1899] 2 Ch. 204.

CHAPTER XXII.

CONSEQUENCES OF WINDING UP.

(1) **As to shareholders.**

On a winding up the liquidator settles a list of "**contributories**" (*a*).

Every past or present shareholder becomes a contributory, *i.e.*, is bound to contribute towards payment of the debts and winding-up expenses of the company unless he can bring himself within the following exceptions.

In the case of a company limited by shares **no contribution can be required from any member exceeding the amount, if any, unpaid on the shares** in respect of which he is liable.

(As to Guarantee Companies, see p. 232, *ante*.)

A **past** member is **not** liable to contribute—

(1) if he has ceased to be a member for one year or upwards before the commencement of the winding up; or

(2) in respect of any debt of the company contracted after he ceased to be a member; or

(3) unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them.

(*a*) Companies Act, s. 163.

Result. A present member is only liable to the extent to which his shares are not fully paid up.

A past member in addition to this limitation can only be made to contribute, if he has ceased to be a member within the year, and the present members fail to meet their liabilities in respect of the debts incurred while he was a member.

There are therefore two limitations on the liability of a B contributory—

(1) He is only liable to the extent to which the transferee of his shares has failed to pay them up in full.

(2) He can only be called upon to pay so much of this amount as is necessary to pay so much of the debts incurred while he was a member as remain unpaid after applying all the contributions of the A contributories and all the assets of the company *pari passu* towards payment of all its debts, irrespective of the date when they were incurred (*b*).

Present members are put on the "A" list.

Past members are put on the "B" list.

(As to the method of settling the list, see pp. 279 and 280.)

A member may be liable for all the debts of the company, if he knows that the company is carrying on business with less than seven members (*c*).

A person who is wrongly put on the list of contributories may apply to the court to rectify the list. He does not lose this right by delay (*d*) unless his liability has been determined by an order of the court, in which case he must appeal within the proper time (*e*).

The liability is enforced by means of calls.

In a winding up by the court the liquidator can

(*b*) Companies Act, s. 123 (1) (iv).
(*c*) Companies Act, s. 115.
(*d*) *Shewell's Case*, L. R. 2 Ch. 387.
(*e*) *Dickson's Case*, 12 Ch. D. 298.

make a call with the sanction of the committee of inspection or an order of the court (*f*).

A call so made can be enforced against any person whose name has been finally settled on the list of contributories by an order of the court made in chambers or a summons by the liquidator (*g*). An order so made is conclusive (*h*).

On a voluntary winding up the liquidator can make the call without any sanction.

He should follow the procedure adopted under a winding-up order, but is not bound to do so (*i*). The list of contributories settled by the liquidator in a voluntary winding up is *primâ facie* evidence (*k*), but not conclusive evidence of the liability of the contributory (*i*). The call can be enforced by an action, or by summons to the court, and the shareholder is allowed, if he can, to disprove his liability.

So soon as a call is made, the liability of the contributory arises and is in the nature of a speciality debt (*l*).

Calls may be made in respect of partly paid shares in order to distribute the assets fairly among all the shareholders (*m*), unless the articles provide otherwise (*mm*).

The liabilities of the contributories and their rights over the assets of the company are adjusted by the court.

Re Wakefield Rolling Stock Co., [1892] 3 Ch. 165.

The capital was divided into 30,000 fully paid £1 shares and 24,000 shares of £5 each on which £1 was paid. Some of the £5 shares had been fully paid up in advance of calls. On the winding

(*f*) Companies Act, s. 166. W. U. Rules, 1909, R. 75.
(*g*) W. U. Rules, 1909, R. 87.
(*h*) Companies Act, s. 168.
(*i*) Buckley, 10th ed., p. 434.
(*k*) Companies Act, s. 186 (vi). (*l*) *Ibid.*, s. 125.
(*m*) *Welton* v. *Saffery*, [1899] A. C. 299.
(*mm*) *Re Kinatan (Borneo) Rubber, Ltd.*, [1923] 1 Ch. 124.

up, after paying the debts, there was not enough to pay all the contributories in full:—**Held,** the assets must be applied (1) in paying back the amount advanced on the £5 shares with interest; (2) in paying 16*s.* per share on the fully paid £1 shares; and (3) the rest to be divided *pro rata* between the holders of all shares.

A contributory who is a creditor of the company **cannot set off his debt against his liability for calls** (*n*); whether the call was made by the company before liquidation or by the liquidator afterwards (*o*).

In re G. E. B. (a debtor), [1903] 2 K. B. 340.

The liquidator obtained judgment against B. for calls. The company owed money to B. The liquidator served a bankruptcy notice on B. B. claimed that the notice was bad as he had a right of set off, and, therefore, did not owe anything to the company:—**Held,** the notice was good; for he had no right of set off.

The court may order a contributory to pay any other debt due from him to the company (*p*). *When all the creditors are paid in full*, any debt due from the company to the contributory may be set off against subsequent calls (*q*). Debts due to the company and calls made before winding up may be set off against debts due from the company in case of unlimited companies (*r*).

A fully paid shareholder may not be put on the list of contributories merely to give the court the power to order him to pay his debts to the company.

Re Marlborough Club Co. (1868), L. R. 5. Eq. 365.

The liquidator proposed to supplement the list of contributories by a list of fully paid shareholders who owed money for subscriptions, drinks, etc., to the club:—**Held,** these shareholders cannot be put on the list solely to give the court jurisdiction to enforce payment of debts due from them.

(*n*) Even if there is an express agreement to do so. *Law Car and General, etc., Company*, [1912] 1 Ch. 405.
(*o*) Buckley, 10th ed., p. 396.
(*p*) Companies Act, s. 165 (i).
(*q*) Sect. 165 (3). (*r*) Sect. 165 (2).

If a contributory dies, his personal representatives become liable to pay the calls out of his assets, and his estate may be administered by the court for this purpose (*s*).

If he becomes bankrupt his trustee in bankruptcy represents him, and all calls made and the estimated value of future calls are provable in the bankruptcy (*t*).

The husband of a woman married before 1883 becomes liable as a contributory in respect of shares held by her (*x*).

If a contributory is about to abscond or remove his property in order to evade calls, he may be arrested and his property seized (*y*).

Every transfer of shares or alteration in the status of a shareholder after commencement of the winding up is void unless the court otherwise orders (*z*).

As between the contributories all books and papers of the company and of the liquidators are *primâ facie* evidence (*a*).

A contributory is entitled to inspect the file of the company kept by the registrar (*b*).

(2) **As to the creditors of the company.**

In the winding up of any company whose assets are insufficient for the payment of its debts **the same rules prevail** as to (1) the respective rights of secured and unsecured creditors, (2) as to debts provable, and (3) as to the valuation of annuities and future and contingent liabilities, **as are in force under the law of bankruptcy** (*c*).

This applies to a voluntary winding up if the company is insolvent (*d*).

(*s*) Companies Act, s. 126.
(*x*) *Ibid.*, s. 128.
(*z*) *Ibid.*, s. 205.
(*b*) W. U. Rules, 1909, r. 19.
(*c*) Companies Act, s. 207 (1).
(*d*) *Re Thos. Salt & Co.*, [1908] W. N. 63.
(*t*) *Ibid.*, s. 127.
(*y*) *Ibid.*, s. 176.
(*a*) *Ibid.*, s. 220.

Result of this Rule.

A **secured creditor** may either (1) value his security and prove in the winding up for the balance of his debt, or (2) give up his security and prove for the whole amount (*e*).

A judgment creditor who has levied execution before the winding up may realise his security (*f*).

Where the security is only a floating charge secured by debentures, certain unsecured debts are paid before the debenture-holders (*g*), and before any other payments for carrying on the business (*h*).

These **preferential payments** are—

(i.) Rates and taxes for not more than one year.

(ii.) Wages of a clerk or servant for not more than four months and not exceeding £50.

This may include the secretary (*i*), but not a managing director (*j*), or a contributor to a magazine (*k*).

(iii.) Wages of a workman for not more than two months and not exceeding £25.

(iv.) Compensation due to an employee under the Workmen's Compensation Act, 1906, but not exceeding £100 (*l*).

(v.) Sums payable by an employer under the National Insurance Act, 1911 (see sect. 110).

The material date for these calculations is the date of the

(*e*) *Re Ligonel Spinning Co.*, [1900] 1 I. R. 326.
(*f*) Or where he has been prevented from levying execution by a trick. *Armorduct Co.* v. *General Incandescent Co.*, [1911] 2 K. B. 143.
(*g*) Companies Act, s. 209.
(*h*) *Woods* v. *Winksie*, [1913] W. N. 212.
(*i*) *Cairney* v. *Back*, [1906] 2 K. B. 746.
(*j*) *Re Newspaper's Syndicate*, [1900] 2 Ch. 349.
(*k*) *Re Beeton & Co.*, [1913] W. N. 200.
(*l*) *Renishaw Iron Co.*, [1917] 1 Ch. 199.

winding-up order, or, if there has been a previous voluntary winding up, the date of the commencement of the winding up (*m*).

These preferential debts have priority also over a landlord's right of distraint, if exercised within three months before the date of the winding-up order, and they are a first charge on the goods so distrained or the proceeds of sale (*n*).

Crown debts have no priority (*nn*).

Unsecured creditors are paid in the following order:—

(1) Preferential payments as above.

(2) Other debts *pari passu*—except that

(3) debts in respect of which a rate of interest is paid varying with the profits of a business are postponed until other debts are paid in full.

Debts which may be proved include "All debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding in damages" (*o*).

Re Patent Floor Cloth Co. (1872), 26 L. T. 467.

D. and G. were employed by the company as travellers on commission for three years. During the first year they made £400. The company was wound up. D. and G. claimed £800 damages:—**Held,** they can claim for a fair proportion of their prospective loss.

Persons who claim to be creditors must prove their debts within the time fixed by the liquidator (*p*).

If a creditor does not prove within the time fixed, he may still

(*m*) *Havana Exploration Co.*, [1916] 1 Ch. 8.

(*n*) Companies Act, s. 209 (4). The landlord stands in the place of the preferential creditor in respect of any moneys so paid.

(*nn*) *Re H. J. Webb & Co.*, [1922] 2 Ch. 369.

(*o*) Companies Act, s. 206. As to the measure of damages see *Re Vic Mill*, [1913] 1 Ch. 465. *Re Law Car & General Co.*, [1913] W. N. 157.

(*p*) *Ibid.*, ss. 169 and 173, and rule 102 of 1909.

prove, and may then be paid out of any assets remaining in the hands of the liquidator; but he cannot upset any dividend which has been paid (*q*).

If he has not claimed enough in his proof, he may get leave to amend it (*r*).

The costs of proving a debt are added to the amount of the debt. But if the creditor commences an action for the debt before the winding up, and the liquidator continues to defend the action, and fails, the costs are paid first out of the assets (*s*).

The court has a discretion and has refused to allow costs to be paid in this way, where the liquidator offered to allow the creditor to prove in the winding up for an amount to be ascertained in the winding-up proceedings (*t*).

The liquidator must not pay statute-barred debts if the shareholders object (*u*).

The taxation of a solicitor's bill of costs against the company must be dealt with in the winding up (*x*) even if the work was done before winding up, if the solicitor has submitted to the jurisdiction (*y*).

A creditor can prove for **interest** on his debt up to the date of the winding up, as follows—

(1) If interest has been agreed to be paid, interest may be claimed at the agreed rate.

(2) If the debt is payable at a certain date under a written instrument, interest at 4% from that date.

(3) Otherwise interest at 4% from the date of a demand in writing stating that interest will be claimed (*z*).

If the company is insolvent, then both in a compulsory and a voluntary liquidation, interest ceases to run at the commencement of the winding up (*a*).

(*q*) *General Rolling Stock Co.* (1871), L. R. 7 Ch. 646.
(*r*) *Re Henry Lister*, [1892] 2 Ch. 417.
(*s*) *Wenborn & Co.*, [1905] 1 Ch. 413.
(*t*) Cf. *Rose & Co.* v. *Gardden Lodge Co.* (1878), 3 Q. B. D. 235.
(*u*) *Re Fleetwood, etc., Co.*, [1915] W. N. 89.
(*x*) *Re Foss, Bilbrough & Co.*, [1912] 2 Ch. 161.
(*y*) *Re Palace Restaurants, Ld.*, [1914] 1 Ch. 492.
(*z*) W. U. Rule 97. As to interest on a secured debt, see *ante*, p. 177, and *Re Marine Mansions*, L. R. 4 Eq. 601.
(*a*) *Re Thos. Salt*, [1908] W. N. 63.

If the company is solvent, *i.e.*, if there is a surplus after paying capital and interest on all debts up to the commencement of the winding up, interest is payable from that date up to the date of payment (*b*).

A creditor who has proved his debt may inspect the file of proceedings of the company kept by the registrar (*c*).

Set Off.—The same rules apply as in bankruptcy.

Therefore where there have been mutual dealings between a creditor and the company, the debt due from one can be set off against the debt due from the other, and the creditor can only prove, or be made liable for, the balance (*d*).

As to set off in case of calls, see p. 263.

The bankruptcy rules as to **fraudulent preferences** also apply (*e*).

Re Jackson & Bassford, Limited, [1906] 2 Ch. 467.

The principal director of a private company guaranteed the overdraft of the company at its bankers, and the company agreed to give him debentures "whenever called upon by him to do so." The director called for his debentures less than four weeks before the company was wound up:—**Held**, the debentures were a fraudulent preference.

The presentation of the petition or the winding up resolution corresponds with the presentation of the bankruptcy petition (*e*).

The sale of an insolvent business to a private company for shares or debentures may be set aside as fraudulent (*f*), or may be treated as an act of bankruptcy (*g*).

(*b*) *W. W. Duncan & Co.*, [1905] 1 Ch. 307.
(*c*) W. U. Rules, 1909, r. 19.
(*d*) Bankruptcy Act, 1914, s. 31, and see *H. E. Thorne & Son, Ld.*, [1914] 2 Ch. 438. As to set off by a liquidator against an insolvent estate, see *Peruvian Railway Co.*, [1915] 2 Ch. at p. 150, and as to set off between two companies in liquidation, *National Live Stock Co.*, [1917] 1 Ch. 628.
(*e*) Companies Act, s. 210. The section says "act of bankruptcy"; but this is a slip, and was disregarded in *Re Russell Hunting Record Co.*, [1910] 2 Ch. 78, and see *Gonville's Trustee* v. *Patent Caramel Co.*, [1912] 1 K. B. 599.
(*f*) *Re Goldburg*, [1912] W. N. 8.
(*g*) *Re David & Johnson*, [1914] W. N. 104.

Deed of Arrangement.

An assignment by a company of all its property to a trustee for all its creditors is void (*h*).

If a **floating charge** is created within three months of a winding up, the charge is void except as to any money paid at the time the charge was given, unless the company can be proved to have been solvent (*i*).

Columbian Fireproofing Co., [1910] W. N. 95.

Money advanced a few days before the charge was given and in reliance on a promise to execute the charge was held to be money paid "at the time."

The payment must be a payment in cash (*k*).

The **reputed ownership** clause (*l*) (by which the property of other persons left in the possession of the bankrupt may pass to the trustee in bankruptcy) does not apply to the winding up of a company.

Gorringe v. Irwell Works (1886), 34 Ch. D. 129.

C. & Co. owed money to the I. Company. The I. Company owed money to H. & Co. The I. Company wishing to pay H. & Co., wrote to them, "We hold at your disposal £425 due to us from C. & Co." No notice of this assignment was given to the debtor (C. & Co.). The I. Company was wound up:—**Held,** the assignment is good (as between the I. Company or their liquidator and H. & Co.). The reputed ownership clause does not apply to the winding up of companies.

(3) **As to the servants of the company.**—A winding up by order of the court operates as a discharge of the servants of the company.

(*h*) Companies Act, s. 210, and see *Gonville's Trustee* v. *Patent Caramel Co.*, [1912] 1 K. B. 599. A debenture containing a floating charge has been held to be an "assignment" within this section. *London Joint, etc., Bank* v. *Dickinson*, [1922] W. N. 13.

(*i*) Companies Act, s. 212.

(*k*) *Orleans Motor Co.*, [1911] 2 Ch. 41, and see *Gregory Love & Co.*, [1916] 1 Ch. 203.

(*l*) S. 38 (2) (*c*) of the Bankruptcy Act, 1914.

Measures Brothers, Limited v. Measures, [1910] 1 Ch. 336.

M. agreed to act as director for the company for seven years and that he would not engage in any competing business for seven years after he should cease to hold office. The company was ordered to be wound up:—**Held,** the winding-up order operated as a wrongful dismissal of M., and he was free from his agreement not to compete with the company.

A voluntary winding up does not necessarily operate as a discharge (*m*), but may do so, where there is an agreement for employment for a fixed time (*mm*).

(4) **As to the officers of the company.**—When a winding-up order has been made, or a liquidator appointed in a voluntary winding up, the powers of the directors cease (*n*).

When a winding-up order has been made the **court may summon any officer of the company,** or any person indebted to the company, or who has property of the company in his possession, or who can give any information as to the company and order him to bring with him any books and documents relating to the company (*o*).

If the official receiver has reported that fraud has been committed, the court may order that any person who has taken part in the promotion of the company, or has been a director or officer of the company, shall attend and be **publicly examined** on oath as to the formation and business of the company and as to his conduct (*p*).

There need only be a *primâ facie* case of suspicion.

Re Bank of Hindustan (1871), L. R. 13 Eq. 178.

F. held forty-five shares in the company and could not be

(*m*) *Midland Counties Bank* v. *Attwood*, [1905] 1 Ch. 357.
(*mm*) *Shirreff's Case*, L. R. 14 Eq. 417, and *Reigate* v. *Union Co.*, [1918] 1 K. B. 592.
(*n*) Buckley, 10th ed., p. 432, note 4, citing *Fowler* v. *Broad's Nightlights*, [1893] 1 Ch. 724, Companies Act, s. 186 (iii).
(*o*) Companies Act, s. 174. (*p*) *Ibid.*, s. 175.

found. Mrs. E., his mother-in-law, refused to give his address :— **Held**, an order may be made for her examination.

Such an order will not be made merely for the purpose of enabling a dissentient shareholder in a reconstruction (see p. 296) to ascertain the value of his share of the assets (*Re British Building Stone Co.*, [1908] 2 Ch. 450).

The examination may be directed to be made in open court; but only in special circumstances (*q*).

The person examined must answer questions which relate to mere hearsay, but not questions which may tend to incriminate him (*r*).

If any director, promoter, liquidator or officer of the company has misapplied or retained money or property of the company or has been guilty of **misfeasance or breach of trust**, the court may examine into his conduct and order him to repay or restore the money or property or to pay compensation.

The official receiver or liquidator or any creditor or contributory may apply to the court by summons for this purpose (*s*). The court can direct or authorise the liquidator to prosecute any officer or member of the company who has been guilty of any criminal offence in relation to the company and may order the costs of the prosecution to be paid out of the assets of the company (*t*).

An officer of the company may inspect the file of proceedings of the company free of charge (*u*).

"**Officer of the company**" includes the directors, managers, etc., and may include the secretary, solicitor (*x*), or auditors (*y*) of the company.

(5) **As to dispositions by the company.**—Dispositions by the company of its property after the

(*q*) *Re Property Insurance Co.*, [1914] W. N. 132.

(*r*) The person examined may be entitled to his costs if he is a party or likely to be a party, but not otherwise (*Re Appleton*, [1905] 1 Ch. 749).

(*s*) Companies Act, s. 215.

(*t*) *Ibid.*, s. 217.

(*u*) W. U. Rules, 1909, R. 19.

(*x*) *E.g.* if he is employed at a salary. *Re Harper's Ticket Co.*, 1912, W. N. 263, and see *Re Liberator Society* (1893), 71 L. T. 406.

(*y*) See p. 225.

commencement of the winding up are void unless the court otherwise orders.

Gibbs and West's Case (1870), L. R. 10 Eq. 312.

After the winding-up petition the company wanted money at once, and borrowed £5000 from its bank, and gave the bank a charge for £5000 on the proceeds of a call made before winding up, which would be paid in a few days:—**Held**, the money was borrowed to prevent the cessation of the company. Therefore the court ought to allow the charge.

The liquidator can make contracts, but only so far as necessary for the beneficial winding up of the company. See p. 277.

(6) **As to proceedings against the company.—After the winding-up petition** is presented the court **may** stay any proceedings against the company (*z*).

The court will usually do so when the petition stands over with a view to a scheme of arrangement being adopted (*zz*).

After the winding-up order all proceedings against the company **must** cease, unless the court gives special leave for them to continue (*a*). And any distress or execution put in force against the assets of the company after commencement of the winding up is void (*b*).

But the court will not, as a rule, interfere if the distress was levied before winding up, though not completed till afterwards, even though it be for rent in advance (*c*). If rent accrues after the winding up for the convenience of the winding up, the landlord will be allowed to distrain in full (*c*); for all costs incurred in the winding up are payable in full before the assets are distributed.

The liquidator may also become liable on some of the covenants in the lease (*d*).

(*z*) Companies Act, s. 140.
(*zz*) *Bowkett* v. *Fuller's United Electric Works*, [1923] 1 K. B. 160.
(*a*) Companies Act, s. 142. (*b*) *Ibid.*, s. 211.
(*c*) *Verner's Electrical Co.* v. *Thorpe*, [1915] W. N. 293.
(*d*) *Re Levi & Co., Ld.*, [1919] 1 Ch. 416.

The same rules apply to a winding up under supervision.

On a **voluntary winding up** the court **may** restrain proceedings against the company.

Westbury v. Twigg, [1892] 1 Q. B. 77.

The plaintiff got judgment for a debt against the company on the same day as the voluntary winding up commenced. Next day the sheriff took possession in execution of the judgment:—**Held**, if on a compulsory winding up the execution would be stayed *ipso facto*, then the court has power to do so at any time before the sale.

(7) **As to costs.** If the company, while in liquidation, brings or defends an action and is ordered to pay costs, they are paid first out of the assets of the company (*e*). The same rule applies in a voluntary liquidation (*f*). The court also provides for the payment of the costs of the liquidation (*g*).

Unless otherwise ordered, the assets are applied in the following order—

(1) Fees and actual expenses incurred in getting in and realising the assets.
(2) Costs of the petition.
(3) Remuneration of special manager.
(4) Costs of making the company's statement of affairs.
(5) Costs of shorthand writers appointed to take examinations.
(6) Other necessary disbursements by the liquidator.
(7) Costs of persons properly employed by the liquidator with the sanction of the court or the committee of inspection.
(8) Remuneration of the liquidator.
(9) Out of pocket expenses of the committee of inspection (*h*).

(*e*) *Re Wenborn & Co.*, [1905] 1 Ch. 413.
(*f*) *Re Pacific Coast Syndicate*, [1913] 2 Ch. 26, and also in arbitrations, *Van den Hurk* v. *R. Martens & Co.* [1920], W. N. 96.
(*g*) Companies Act, s. 171.
(*h*) W. U. Rule, 187.

CHAPTER XXIII.

LIQUIDATORS.

Section 1.

On a winding up by the court.

Appointment.—After the presentation of the petition the court **may** appoint the official receiver or any other person to be a provisional liquidator before the winding-up order is made.

As soon as the winding-up order is made the **official receiver becomes provisional liquidator** (*a*). The official receiver summons separate meetings of creditors and contributories to determine whether applications shall be made to the court.

(1) To appoint a liquidator.

(2) To appoint a **committee of inspection.**

Committee of inspection (*b*).

The liquidator is in some matters (see p. 277) subject to the control of this committee, or, where no such committee is appointed, of the Board of Trade. The committee consists of creditors and contributories or their attorneys. The numbers of each are determined by agreement or by the court. The committee meets at least once a month, and the liquidator or any member may summon a meeting. The quorum is a majority of the committee. A member of the committee may resign or may be removed by an ordinary resolution at a meet-

(*a*) Companies Act, s. 149, 3 (b). (*b*) *Ibid.*, s. 160.

ing of creditors (if he represents creditors) or of contributories (if he represents them); he vacates office if he becomes bankrupt or is absent from five consecutive meetings without leave.

When a vacancy occurs, the liquidator must summon a meeting of creditors or contributories to fill the vacancy. If there is no committee, most of the powers of the committee devolve upon the Board of Trade, and may be exercised by the official receiver (*c*).

Special manager (*d*).

The official receiver while he is acting as liquidator may apply to the court to appoint a special manager, if he thinks that the business of the company or the interests of the creditors or contributories require it.

Such a manager has the powers of an ordinary receiver and manager, or such other powers as the court directs. He must give security, and his remuneration is fixed by the court.

He must account to the official receiver.

Shortly after the winding up has commenced **the court appoints a liquidator** (*e*), unless the liquidation is left in the hands of the official receiver.

If a liquidator is appointed, he must notify his appointment to the registrar, and give security not to make away with the assets, and he is not capable of acting as liquidator until this has been done (*f*). The official receiver must render an account of the liquidation to the liquidator (*g*).

The liquidator should be an independent person; but the secretary of the company may be appointed, unless his conduct, or that of the directors, ought to

(*c*) W. U. Rule, 205.
(*d*) Companies Act, s. 161.
(*e*) *Ibid.*, s. 149
(*f*) *Ibid.*, s. 149, 3 (c).
(*g*) W. U. Rule, 204.

be inquired into. The wishes of the creditors are regarded in the choice of the liquidator.

Re Association of Land Financiers (1878), 10 Ch. D. 269.

The company was wound up and W. was appointed liquidator. 250 unsecured creditors applied by motion that two creditors might be appointed instead of W. The order was made as asked.

An irregularity in the appointment of a liquidator does not invalidate any act done by him in good faith (*h*).

The liquidator is paid a salary, which is determined by the court. A liquidator may resign or may be removed by the court (*i*).

A contributory or a creditor can apply for his removal; but not an outside person (*k*). In case of any vacancy, the official receiver becomes the liquidator.

The liquidator takes into his custody all the property of the company. **The property does not vest in the liquidator.** He is a trustee for all persons who were creditors of the company at the date of the winding up. (It is for this reason that the statute of limitations does not run after the winding up has commenced.) The liquidator represents both the company and the creditors; he is in the position of a receiver and manager of partnership assets, and he must give the creditors and contributories every assistance in inspecting the books of the company, etc.

(*h*) W. U. Rule, 217.
(*i*) Companies Act, s. 149 (6). *Re Karamelli & Barnett, Ld.*, [1917] 1 Ch. 203.
(*k*) *Re New de Kaap, Limited*, [1908] 1 Ch. 589.

Powers of the liquidator (*l*).

(A) With the sanction of the court or of the committee of inspection :—

(1) To bring and defend actions in the name of the company.

If he brings an action in the name of the company, he does not become liable for costs; but if he brings it in his own name, he is personally liable, but has a right to be indemnified out of the assets of the company.

(2) To carry on the business of the company **so far as may be necessary for the beneficial winding up.**

Re Wreck Recovery Co. (1880), 15 Ch. D. 353.

The company was being wound up. L., one of the shareholders who believed in the value of the company's patents, made a contract with the liquidator whereby he was to have the use of the plant of the company to raise three sunken vessels at his own expense, the profits (if any) to go to the company :—**Held,** the contract was bad; as it was not for the purpose of beneficial winding up, but to resuscitate the company.

(3) To employ solicitors or agents to take proceedings or do any business **which he cannot do himself.**

(B) Without such sanction :—

(1) To sell and transfer the property of the company.

(2) To execute and seal documents and deeds on behalf of the company.

(3) To prove in the bankruptcy of any contributory.

(4) To draw bills of exchange and promissory notes: these will have the same effect as if drawn by the company in the course of its business.

(5) To raise money on the security of the assets.

(*l*) **Companies Act, s. 151.**

(6) To take out in his own name letters of administration to any deceased contributory.

(7) To do all things necessary for the winding up of the company and distributing the assets.

(8) **To summon meetings** of creditors and contributories.

He may summon meetings at any time when he desires to ascertain the wishes of creditors or contributories (*m*); and he is bound to have regard to their wishes when ascertained.

He must summon meetings at any times fixed by the creditors or contributories in their meetings, or when requested in writing by one-tenth in value of the creditors or contributories (*m*).

The exercise of all these powers is subject to the control of the court.

Also, by the Winding-up Rules, 1909, the liquidator may exercise the following powers, which by the Companies Acts are assigned to the court:

(1) **Fix a date by which creditors must prove their claims** or be debarred from all remedy against the company;

(2) **Settle the lists of contributories** (*n*).

There are two lists, the "A. list," or list of persons liable to contribute as present members, and the "B. list" of persons who have ceased to be members within a year of the winding up. See p. 261, above. Each list distinguishes between those who are liable personally and those who are liable as personal representatives, etc.

The liquidator is entitled and is bound to get all contracts for the allotment of shares otherwise than for cash filed with the registrar (*Re X. & Co.*, [1907] 2 Ch. 92).

The list of contributories is *primâ facie* evidence.

(*m*) See Companies Act, s. 158. (*n*) *Ibid.*, s. 163.

(3) **To make calls** on the contributories for the purpose of paying the debts of the company and for adjusting the rights of the contributories *inter se* (*o*).

An immediate call may be made, though by the terms of allotment the calls are only payable by instalments; for the statutory right of the liquidator to make calls takes the place of the company's right to make calls under its agreement (*Fowler* v. *Broad's Night Light Co.*, [1893] 1 Ch. 724).

Any order made by the court as to calls is conclusive; but is only *primâ facie* evidence against the real estate of a deceased contributory unless the heir or devisee was on the list of contributories (*p*).

SPECIAL NOTE.

On the Powers and Duties of Liquidators.

(This note is intended for the use of accountants and others specially interested in the position and duties of liquidators.)

On a winding up by the court.

The liquidator is under the control and supervision of the Board of Trade.

The duties of liquidators are defined partly by the Companies Act, but chiefly by the Companies (winding up) Rules 1909, which also prescribe forms which must be followed so far as circumstances will allow.

Notice of Appointment.

The liquidator must give notice of his appointment to the registrar and give security before he can act (*q*).

Settling List of Contributories.

The liquidator as soon as possible after his appointment appoints a time and place for settling the list, and gives notice in writing of the time and place to every person whom he intends to include in the list.

(*o*) See *Wakefield Rolling Stock Co.*, on p. 262.
(*p*) Companies Act, s. 168. (*q*) S. 149 (3) (*c*).

On the day so appointed the liquidator hears any persons who object to being put on the list, and then finally settles the list. He then gives notice to every person on the list, informing him that any application to vary the list must be made to the Court by summons within twenty-one days. The Court may vary the list or may extend the time for application to vary the list, and the liquidator may himself add to or vary the list.

The list shows the address and number of shares of each contributory, distinguishing the classes of shareholders and showing whether they hold in a representative capacity. The notice should show in what capacity each person is put on the list and for what number of shares (*r*).

The B. list is not settled until it has been shown that the present members are unable to satisfy the debts (*s*).

Calls.

If the liquidator desires to make a call:

(1) If there is no committee of inspection, he must get the leave of the court by summons, which must be served on every contributory at least four days before the call is made.

(2) If there is a committee, he should summon a meeting of the committee for the purpose of obtaining their sanction.

Notice of the meeting must be given in time to reach each member of the committee not less than seven days before the meeting, and must state the proposed amount of the call and the purpose for which it is to be made.

The notice must also be advertised.

Any statements or representations made by contributories to the committee or liquidator must be considered before the call is sanctioned.

The majority of the committee may sanction the call.

The liquidator must file with the registrar the document making the call, and must serve on each contributory a copy of the resolution of the committee or order of the court with a notice stating the amount or balance due from him in respect of the call.

The call may be enforced by an order.

(*r*) W. U. Rules, 77 to 82. (*s*) Buckley, 10th ed., p. 296.

Admission and rejection of Proofs (*t*).

The liquidator fixes a date not less than fourteen days from the date of the notice on or before which the creditors must prove their debts or be excluded, and the liquidator must advertise the date so fixed and give notice of it to every person who appears in the statement of affairs to be a creditor or who to the liquidator's knowledge claims to be a creditor, and whose claim has not been admitted.

The debts must be proved by affidavit verified by production of vouchers, if required, and stating whether the creditor is a secured creditor or not (*u*).

Trade discounts must be deducted, but discounts not exceeding 5 per cent. agreed to be allowed for payment in cash need not be deducted.

Rent or other payments falling due at stated periods may be apportioned.

Future debts may be proved for with a deduction of a rebate at the rate of 5 per cent. per annum.

Where there are numerous claims as for wages to workmen, they can be proved for by one affidavit with a schedule.

The liquidator must examine every proof and must within twenty-eight days (*x*) either admit it in writing, or reject it in writing, stating his grounds, or require further evidence.

If he has given notice of intention to declare a dividend, his decision must be notified within fourteen days after the last date for lodging proofs (*y*).

A creditor can appeal to the court against the rejection of a proof, on giving notice within twenty-one days of rejection, and the liquidator, or in default, any creditor or contributory, can apply to the court to expunge a proof after it has been admitted, or to reduce its amount (*z*).

The liquidator on the first day of each month must file a list of proofs received during the month, showing whether they are accepted or rejected or stand over, and when a creditor gives notice of intention to appeal against the rejection of a proof the liquidator must file the proof within three days (*a*).

(*t*) W. U. Rules, 88 to 114.
(*x*) *Ibid.*, 113.
(*z*) *Ibid.*, 104, 105, 106.
(*u*) *Ibid.*, 92.
(*y*) *Ibid.*, 113.
(*a*) *Ibid.*, 110, 111.

Dividends (*c*).

The liquidator must give not more than two months' notice to the Board of Trade of his intention to declare a dividend, and must give notice to all creditors mentioned in the statement of affairs who have not proved their debts, fixing a date (not less than fourteen days from the notice) up to which proofs may be lodged. If after this date a creditor wishes to appeal against the rejection of his proof, he must give notice within seven days, and the liquidator may set aside a sufficient sum to provide for the dividend on this debt, if proved, and the cost of proof.

The liquidator excludes from the dividend all proofs which have been rejected where no notice of appeal has been given within the specified time.

If the dividend has to be postponed for more than two months, fresh notice must be given to the Board of Trade, but no new notice need be given to creditors who have not proved.

When the dividend is declared, the liquidator transmits to the Board of Trade a list of the proofs filed with the registrar.

Where a dividend is to be returned to contributories the liquidator must prepare a list of the persons to whom it is to be paid, and the amounts payable to each, and this is appended as a schedule to the order authorising him to make the return (*c*).

If too much is paid to the shareholders, they may be ordered to refund the amount (*d*).

Security.

The Board of Trade directs what security shall be given and how. When security is given, a certificate of the Board is filed with the registrar.

The liquidator pays the costs of giving security, including premiums to guarantee societies, and is not entitled to have this refunded out of the assets (*e*).

If the liquidator fails to give security, the court may rescind the order appointing him, and if he fails to keep up his security, he may be removed. The same proceedings will then be taken as on the first appointment of a liquidator (*f*).

Remuneration.

The liquidator's remuneration (unless the court otherwise orders) is fixed by the committee of inspection. It consists of a commission

(*b*) W. U. Rule, 150. (*c*) *Ibid.*, 151.
(*d*) *Re Birkbeck Building Society*, [1915] 1 Ch. 91.
(*e*) *Ibid.*, 57. (*f*) *Ibid.*, 58.

partly on the amount realised (less sums paid out of their securities to secured creditors other than debenture holders) and partly on the dividends distributed.

The Board of Trade may apply to the court to reduce the remuneration.

If there is no committee, the scale of fees payable on realisation and distribution by the official receiver applies (*g*).

The liquidator must not receive any further remuneration or gift from any person connected with the company, nor must he share his remuneration with any such person (*h*).

A member of the committee of inspection must not without the sanction of the court receive any remuneration or make any profit, directly or indirectly, out of the liquidation (*i*).

Payment of Moneys (*j*).

Moneys received by the liquidator must be paid into the Companies Liquidation Account at the Bank of England as directed by the Board of Trade, unless the committee of inspection satisfy the Board of Trade that for the purpose of carrying on the company's business or obtaining advances it would be an advantage for him to have an account at some other bank, in which case the Board may authorise payment of the moneys to his account as liquidator of the company at some other bank selected by the committee for such time as the Board shall direct, or until they order the account to be closed. All payments out of such an account must be by cheque, bearing the name of the company and signed by the liquidator and countersigned by at least one of the committee of inspection, and by any other person appointed by the committee.

The liquidator must not retain in his hands sums over £50 for more than ten days unless authorised to retain more by the Board of Trade. If he does, he is liable

(i) to pay interest on the sums retained at 20 °/₀ per annum,
(ii) to disallowance of his remuneration by the Board,
(iii) to dismissal,
(iv) to refund expenses occasioned by his default.

He must not pay any moneys into his private banking account.

(*g*) W. U. Rule, 154. (*h*) *Ibid.*, 155.
(*i*) W. U. Rules, 158, 160.
(*j*) Companies Act, s. 154; W. U. Rules, 164, 165.

The court may order moneys due to the company to be paid into the liquidator's account at the Bank of England (*k*); and all moneys representing unclaimed assets which have remained unclaimed for six months must be paid into the same account (*l*). Any such moneys remaining in his hands on the dissolution of the company must be paid in at once (*m*).

Meetings of Creditors and Contributories.

No meetings of the company as such are held during a winding up by the court.

The first meetings of creditors and contributories are summoned by the official receiver within twenty-one days (or, if a special manager has been appointed, within one month) after the winding-up order (*n*).

The notice to creditors states the time within which they must lodge their proofs in order to be entitled to vote at the first meeting (*o*).

The official receiver also gives notice of these meetings to the directors, and may require them to attend, and sends to each creditor and contributory a summary of the company's statement of affairs showing the causes of failure, etc.

In addition:—

The liquidator may also summon meetings of creditors and contributories for the purpose of ascertaining their wishes (*p*).

The liquidator must summon meetings—

(a) when requested in writing by one-tenth in value (see p. 278),

(b) to fill vacancies in the committee of inspection (*q*).

The liquidator summons such meetings by seven days' notice in the *Gazette* and one local paper, and by sending notice by post to every person appearing by the company's books to be a creditor or contributory as the case may be (*r*).

The meetings should be held at the place most convenient to the majority of the creditors or contributories, and the meetings of each may be held at different times and places (*s*).

(*k*) Companies Acts, s. 167.
(*l*) *Ibid.*, s. 224.
(*m*) W. U. Rule, 191.
(*n*) Rules 115, 116.
(*o*) Rule 118.
(*p*) Companies Act, s. 158; Rule 121.
(*q*) Companies Act, s. 160 (7).
(*r*) Rule 123.
(*s*) *Ibid.*, 125.

Where a meeting is summoned by the liquidator, he, or someone nominated by him, is chairman (*t*).

Resolutions are passed by a majority in number and value, present in person or by proxy. The value in case of contributories is determined by their voting power under the articles (*u*).

Where a majority in number vote one way and a majority in value vote the other, *e.g.* on a question whether the official receiver shall act as liquidator, the court must decide (*x*).

The liquidator must file with the Registrar a copy of every resolution passed (*y*).

The quorum at each meeting is three.

If the quorum is not present within half an hour, the meeting must be adjourned to the same date in the following week, unless the chairman appoints some other date not less than seven or more than twenty-one days after the meeting.

A creditor cannot vote unless he has lodged a proof within a specified time and his proof has been admitted. He cannot vote in respect of unascertained debts, and in case of secured debts he must surrender his security, or value it, and only vote in respect of the balance (*z*).

The chairman can admit or reject a proof for the purpose of voting, or may allow the creditor to vote subject to the vote being declared invalid (*a*).

Proxies may be used at meetings. They must be in the specified form (*b*). The liquidator may be appointed a proxy. He must not solicit proxies for his own appointment (*c*).

Advertisements, Notices, and Reports.

The liquidator must immediately advertise his appointment and the appointment of the committee of inspection, and must pay the expense of gazetting the notice of his appointment (*d*). Whenever any proceedings are advertised in the *Gazette*, the liquidator must file a memorandum referring to and giving the date of the advertisement. He must keep a copy of every local paper containing an advertisement relating to the liquidation, and must file a memorandum referring to it (*e*).

(*t*) Rule 127. (*u*) *Ibid.*, 128.
(*x*) Cf. *Re Bloxwich Iron & Steel Co.*, [1894] W. N. 111.
(*y*) Rule 129. (*z*) *Ibid.*, 135. (*a*) *Ibid.*, 137.
(*b*) Forms 80 and 81 in appendix to Rules.
(*c*) Rules 139–149. (*d*) W. U. Rule, 55. (*e*) *Ibid.*, 210.

If the liquidation is not concluded within one year, the liquidator must send to the registrar within thirty days after the expiration of the first year of the liquidation, and subsequently at intervals of half a year, a statement in form 92 in the Rules as to the proceedings and position of the liquidation, commencing from the date of his appointment and brought down to the end of one year from the commencement of the winding up.

The statement must be made in duplicate, and is open to the inspection of creditors or contributories on payment of a fee.

It must be verified by affidavit. If he has not received or paid anything, he must still send in the statement with an affidavit of no receipts (*f*).

The liquidator must report to the registrar the order for dissolution of the company (*g*).

Accounts (*h*).

A liquidator at the end of six months from the winding-up order, and at the end of every subsequent six months, must send his accounts to the Board of Trade. They must be kept in duplicate in a cash book in a special form prescribed by the Board, and must be verified by affidavit. He must also send such vouchers and information as the Board requires for the purposes of audit. Two copies are filed, and the account is printed and sent by the Board to every creditor and contributory.

He must send with the first account a summary of the company's affairs showing the amounts realised, and at the end of every six months a report upon the position of the liquidation. When the assets are fully realised, he must send in his account forthwith.

He must also send a summary with sufficient printed copies to be sent to all the creditors and contributories.

If the liquidator carries on the company's business, he must keep a distinct trading account and incorporate the weekly totals in the cash book. The trading account must be verified

(*f*) Companies Act, s. 224 (penalty £50 a day); W. U. Rules, 189–190.

(*g*) Companies Act, s. 172 (penalty £5 a day).

(*h*) *Ibid.*, s. 155, and W. U. Rules, 169, 170.

by affidavit at least once a month, and submitted to the committee of inspection to be examined and certified.

The Board keeps an account of the receipts and payments of every company in liquidation.

The committee of inspection may request that balances not required for the time being may be invested.

If the balance exceeds £2000, the liquidator may give notice that it is not required, and the company then becomes entitled to interest at 2 °/₀ per annum (*i*).

Books and Papers.

A liquidator must keep (*k*) a "Record Book" of minutes of meetings and resolutions of the meetings of creditors and contributories and of the committee of inspection, and other matters necessary to give a true view of his administration. But he need not enter any confidential document, such as opinions of counsel. He must also keep a "cash book" in a form directed by the Board of Trade and enter his receipts and payments.

These books are open to the inspection of creditors and contributories, but they are not entitled to inspect the books and papers of the company except under an order of the court (*l*).

The liquidator must submit the record book and cash book, with vouchers, &c., to the committee of inspection (if any) when required, and not less than once every three months, for audit.

If any books, papers or other assets of the company are in the hands of any shareholder, agent or officer of the company, the liquidator can apply to the court for an order that they be delivered up to him (*m*).

When the company is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of as the court directs, and after five years from the dissolution the responsibility of the liquidator or any person to whose custody they have been committed ceases (*n*).

The Board of Trade may at any time on the application of the liquidator direct that any books and papers no longer

(*i*) Companies Act, s. 231.
(*k*) *Ibid.*, s. 156, and Rules 166 and 167.
(*l*) *Ibid.*, s. 221. (*m*) *Ibid.*, s. 164. (*n*) Companies Act, s. 222.

required for the purposes of the liquidation may be sold or destroyed (*o*).

Release.

The liquidator is under a statutory liability, on which he may at any time be sued by creditors or contributories, until he has obtained his release.

He can apply for his release to the Board of Trade if

(1) he has realised all the property of the company or so much as can be realised without needlessly protracting the liquidation, and has distributed a final dividend to the creditors and adjusted the rights of the contributories and made a final return; or

(2) he has resigned; or,

(3) he has been removed from his office.

He applies to the Board for a report on his accounts.

Before applying for his release, he must give notice of his intention to all the creditors who have proved, and to all the contributories, and send them a summary of his receipts and payments (*p*).

Any creditor or contributory may object to the release, and the Board grants or withholds it as it thinks fit. The Board's decision is subject to appeal to the court, and the court may charge the liquidator with the consequence of any default on his part.

The release when granted discharges the liquidator from all liability in respect of his conduct as liquidator, and can only be set aside on proof of fraud or concealment of material facts (*q*). The order granting a release must be gazetted. If a liquidator dies or resigns after his release, no new liquidator is appointed, but the official receiver remains liquidator (*r*).

Resignation (*s*).

If a liquidator desires to resign, he must summon separate meetings of the creditors and contributories. If they both by ordinary resolution agree to accept his resignation, he files with the registrar a memorandum of his resignation, and sends notice to

(*o*) Winding-up Rule, 175 (2).
(*p*) W. U. Rule, 197.
(*q*) Companies Act, Sect. 157,
(*r*) W. U. Rule, 55.
(*s*) W. U. Rule, 162.

the Official Receiver and his resignation thereupon takes effect. In any other case he must report the result of the meetings to the court and to the Official Receiver, and the court determines whether his resignation shall be accepted.

When a liquidator resigns or is removed, he must hand over to the Official Receiver or the new liquidator all his books and the books, papers and accounts of the company, and his release cannot take effect until he has done this (*t*).

Removal.

A liquidator can be removed

1. By the Court
   - (a) for failing to keep up his security (see p. 282).
   - (b) for any due cause (s. 149 (6)) (*u*).
2. By the Board of Trade
   - (a) For retaining balances of more than £50 for more than ten days (*x*).
   - (b) The Board may, on complaint of a creditor or contributory, take such action as they think fit, if the liquidator does not faithfully perform his duties (*y*).
3. On Bankruptcy.

If a receiving order is made against a liquidator, he is thereupon deemed to have been removed (*z*).

SECTION 2.

On a Voluntary Winding up.

Appointment.

The company in general meeting makes the appointment.

If the company is wound up by special resolution, the liquidator may be appointed either at the confirmatory meeting or at a subsequent meeting (*a*). A

(*t*) W. U. Rule, 175.
(*u*) *E.g.* where he insists on acting in the interests of the shareholders alone, though the assets are insufficient to pay the creditors in full. *Re Rubber and Produce Trust*, [1915] 1 Ch. 382.
(*x*) Companies Act, s. 154.
(*y*) *Ibid.*, s. 159. (*z*) W. U. Rule, 163.
(*a*) *Trench Tubeless Tyre Co.*, [1900] 1 Ch. 408.

special resolution is not necessary, nor need special notice be given of the intention to appoint liquidators.

Re Trench Tubeless Tyre Co., [1900] 1 Ch. 408.

Notices were sent out of a meeting to confirm a resolution to wind up and to appoint W. as liquidator. At the meeting M. was appointed:—**Held**, the appointment was good, as no notice was needed.

The first meeting of creditors called by the liquidator (see p. 292, *post*) may determine to apply to the court to appoint another person to be liquidator in the place of or jointly with the liquidator already appointed, or to appoint a committee of inspection (*a*).

There is no appeal from any such appointment made by the court. The costs of the application may be ordered to be paid out of the assets.

The court may remove a liquidator for due cause (*b*) and appoint another, or may appoint an additional liquidator (*c*).

If a vacancy occurs in the office of liquidator, a general meeting of the company may be convened by any contributory to fill the vacancy (*d*).

The company may delegate to its creditors the power of appointing liquidators (*e*).

If the appointment of the liquidator is defective, he cannot sue for his remuneration; but if the company or the new liquidator take advantage of his services, he can claim reasonable payment (*f*).

A liquidator in a voluntary winding up is not sub-

(*a*) Sect. 188 (2). (*b*) Sect. 186 (ix.).
(*c*) *Re Sunlight Incandescent Co.*, [1900] 2 Ch. 728.
(*d*) Sect. 189. (*e*) Sect. 190.
(*f*) *Re Allison*, [1904] 2 K. B. 327.

ject to the control of the Board of Trade to such an extent as a liquidator in a compulsory winding up; but he is bound to furnish to the Board accounts and particulars of moneys in his hands if directed so to do by the Board; and the Board may audit his accounts (*g*).

If there are several liquidators, their powers may be exercised by any one or more of them as determined at the time of their appointment, or otherwise by any two or more of them (*gg*).

Bolognesi's Case (1870), L. R. 5 Ch. App. 567.

After winding up, a director, who was also one of the four liquidators, accepted a bill of exchange. No authority had been given for one liquidator to act alone:—**Held**, the company was not bound to pay.

POWERS OF LIQUIDATORS ON VOLUNTARY WINDING UP.

The liquidator may exercise the following powers. A. **Without the sanction of the court:**

(1) All the powers given by the Act to a liquidator appointed by the court (*h*).

(2) The powers of the court of settling the list of contributories and making calls (*h*).

B. **With the sanction of an extraordinary resolution of the Company:**

(1) Pay any classes of creditors in full.

(2) Compromise with creditors.

(3) Compromise calls, liabilities, debts, and claim between the Company and contributories (*i*).

(*g*) W. U. Rules, 192, 193.
(*gg*) Sect. 186 (vii).
(*h*) Sect. 186, and see p. 277.
(*i*) Companies Act, s. 214.

C. **With the sanction of a special resolution,**

Sell the assets of the company for shares on a reconstruction under Sect. 192. See p. 295.

Special Note on the Rights and Duties of Liquidators in a Voluntary Winding up.

(This note is intended for accountants and others specially interested in the position of liquidators.)

Notice of Appointment.

The liquidator must within twenty-one days after his appointment file with the Registrar a notice of his appointment in the form prescribed by the Board of Trade (*j*).

MEETINGS.

First Meeting of Creditors.

He must within seven days after his appointment send notice to all persons who appear to be creditors that a meeting of creditors will be held not less than fourteen days nor more than twenty-one days after his appointment. The date and hour must be stated in the notice. He must advertise notice of this meeting once in the *Gazette* and once in two local newspapers.

This meeting is now governed by rules 123 to 132, 134, and 138 to 149 (*jj*), and no solicitation (*i.e.* canvassing) is allowed. The absence of solicitation must be proved by affidavit (*jj*).

General Meetings of the Company.

He must summon a general meeting at the end of the first year of the liquidation and of each succeeding year, and lay before the meeting an account of his acts and dealings and the conduct of the winding up during the year (*k*).

Final Meeting.

He must call a meeting by advertisement in the *Gazette* for the purpose of passing and explaining his final account (see

(*j*) Companies Act, s. 187. Penalty £5 a day.
(*jj*) Winding-up Rules, 1921, Appendix, p. 368. (*k*) *Ibid.*, s. 194.

p. 255), and within a week must make a return to the Registrar of the holding of the meeting and its date (*l*).

Remuneration.

This may be fixed by the company in general meeting, either at the time of his appointment or later, or by the court. Sometimes the liquidator takes such remuneration as he considers proper, and then at the final meeting (*m*) his accounts are passed, including the appropriation of his remuneration (*n*). Any creditor or contributory may apply to the court to revise any decision as to remuneration. The remuneration is payable, with the other costs of liquidation, out of the assets of the company in priority to all other claims (*o*).

Proof of Debts.

The rules as to receiving proofs of debts are the same as in the case of a winding up by the court, except

(1) no notice of the date fixed need be given to persons claiming to be creditors,

(2) no time is fixed within which the acceptance or rejection of a proof need be notified, and

(3) proofs need not be filed (*p*).

Calls.

The liquidator usually gives the same notices to the contributories as on a winding up by the court, but he is not bound to do so (*q*).

Statements to the Registrar.

In case the liquidation continues for more than a year, the liquidator must make the same statements to the Registrar as in a compulsory liquidation (*r*). See p. 286.

Payments of Moneys.

A liquidator in a voluntary liquidation is not bound to pay his balances into the company's liquidation account at the Bank

(*l*) Companies Act, s. 195. Penalty £5 a day.
(*m*) See p. 255, *ante*. (*n*) Palmer, Part III. 12th ed., p. 853.
(*o*) Companies Act, s. 196.
(*p*) W. U. Rules, 107, 110, 111, 113.
(*q*) Buckley, 10th ed., p. 434. (*r*) Companies Act, s. 224.

of England; but he is bound to pay in any moneys representing unclaimed dividends which have been in his hands for more than six months, as in the case of a compulsory liquidation. And on dissolution of the company he must pay in all moneys representing unclaimed or undistributed assets or dividends (*s*).

Books and Papers.

When the company is about to be dissolved, the books and papers may be disposed of as the company by extraordinary resolution directs. The responsibility of the liquidator for the books and papers ceases after five years from the dissolution.

SECTION 3.

Winding up under Supervision.

The court may appoint a liquidator in addition to the liquidator already appointed by the company, and he has the same powers as if he had been appointed by the company.

The court may remove any liquidator, whether appointed by the company and continued by the court or appointed by the court, and any vacancy may be filled by the court (*t*).

As to the powers of a liquidator under a supervision order, see Chapter XXI.

(*s*) W. U. Rule, 191.

(*t*) Companies Act, s. 202.

CHAPTER XXIV.

RECONSTRUCTION.

RECONSTRUCTION occurs when a company transfers the whole of its undertaking and property to a new company, under an arrangement by which the shareholders of the old company are entitled to receive some shares or other similar interests in the new company.

This is frequently done when a company needs more capital and cannot get it without putting some pressure on the existing shareholders. To do this a new company is formed, and the old company sells its undertaking to the new company in return for shares in the new company, in such a way that each shareholder in the old company is entitled to one or more shares in the new. But whereas the shares in the old company were fully paid, those in the new company are only partly paid, so that each shareholder must either undertake a fresh liability for calls or give up his shares.

A sale for shares with a view to reconstruction can only be carried out under the provisions of section 192 of the Companies Act, which provides an ample safeguard for the rights of shareholders who dissent from the scheme, provided they notify their dissent in the proper way.

By section 192.—If a company is being or is **proposed to be wound up** altogether voluntarily, and its property is proposed to be transferred or sold to another company, the liquidators of the first company

may, **with the sanction of a special resolution,** receive in compensation, shares, etc., in the other company to distribute among the members of the first company. This shall be binding on the members of the first company. **But if any member** who has not voted for the special resolution, **expresses his dissent** in writing addressed to the liquidator and left at the registered office of the company within seven days after the confirmation of the resolution, **he may require the liquidator** either—

(1) To abstain from carrying the resolution into effect; or

(2) **to purchase his interest** at a price to be determined by agreement or in default by arbitration.

The money must be paid before the company is dissolved.

If within a year an order is made for winding up by the court or under supervision, **the resolution becomes void** unless sanctioned by the court (*a*).

Thus, the parties to such an arrangement can never be sure that it will ultimately be valid and binding, and the difficulty cannot be got over by applying to the court for its sanction, unless a winding-up order has been made. The only way to make the arrangement certain is to apply to the court for an order for winding up under supervision, and when the order is made, to apply that the arrangement may be sanctioned. This was done in *Re New Flagstaff Co.*, W. N. (1889) 123.

If a shareholder does not dissent in the manner provided by the Act within seven days, he loses his rights in the company.

(*a*) A contributory may petition to wind up the company for the purpose of defeating such a scheme under this provision (*Consolidated South Rand Mines*, [1909] 1 Ch. 491).

The notice of dissent must comply in all material respects with the provisions of the Statute.

Union Bank of Kingston upon Hull (1880), 13 Ch. D. 808.

Held, that the notice of dissent must contain express notice to the liquidator to abstain from carrying the resolution into effect or to purchase the shares (*b*).

But an informality which is merely technical may be waived by the liquidator.

Brailey v. Rhodesia Consolidated, Limited, [1910] 2 Ch. 95.

The registered office of the company was in Rhodesia. B., a shareholder, sent his notice of dissent to the liquidator in London. The liquidator acknowledged the receipt of the notice and took no objection to its form for more than three weeks:— **Held**, the notice was sufficient.

The executors of a deceased shareholder have a right to dissent (*c*).

If there are many dissentient shareholders who give notice of dissent within the proper time and in the proper manner, it becomes very difficult for a company to be reconstructed, for each dissentient shareholder thereby becomes entitled to the value of his share in the company, and this is determined, not by the market value of the share, but by the value of an aliquot part of the whole assets of the company, to be determined, if necessary, by arbitration. Hence companies have frequently tried to evade the Act.

A company cannot deprive its shareholders of their rights as dissentients under this section either directly or indirectly, for—

(1) **Any provision in the Articles depriving members of their rights under this section is void.**

Payne v. Cork Co., [1900] 1 Ch. 308.

The Articles gave the liquidator power on a winding up of the company to sell the undertaking for shares in another company

(*b*) Followed *Re Demarara Rubber Co.*, [1913] 1 Ch. 331.
(*c*) *Llewellyn* v. *Kasintoe Co.*, [1914] W. N. 294.

with the sanction of a special resolution, and provided that, notwithstanding section 192 (then section 161 of the Act of 1862), the shareholders should not have power to require him to buy their shares:—**Held,** the Article is bad.

(2) Schemes by which a company sells its undertaking under a power to do so contained in the Memorandum with a view to reconstruction are void, unless they make proper provision for the rights of dissentient shareholders (*d*).

Bisgood v. Hendersons Transvaal Limited,
[1908] 1 Ch. 743.

The company by special resolution approved a scheme for the sale (under a power in its Memorandum) of all its undertaking to a new company for shares in the new company of £1 each credited as paid up to the extent of 17*s.* 6*d.* per share only. The shares in the new company were to be distributed among the shareholders in the old company. If any shareholders did not approve, the shares to which they were entitled were to be sold and they were to be paid their proportion of the purchase price:—**Held,** the scheme was *ultra vires* and void (*e*).

If the proposed reconstruction is carried out as a scheme of arrangement under Sect. 120 (see p. 254, *ante*), the rights of dissentient shareholders must be properly protected under Sect. 192; otherwise the scheme cannot be sanctioned (*f*).

A company cannot sell its assets under section 192 to a foreign company (*g*); but such a sale can be carried out as a scheme of arrangement under section 120 (*h*).

(*d*) As to the rights of the shareholders to set aside the transaction after it has been completed, see *Clinch* v. *Financial Corporation*, L. R. 4 Ch. 118.

(*e*) Followed *Etheridge* v. *Central Uruguay Ry.*, [1913] 1 Ch. 425.

(*f*) *General Motor Cab Co.*, [1913] 1 Ch. 377. *Re Sandwell Park Colliery*, [1914] 1 Ch. 589.

(*g*) *Thomas* v. *United Butter Companies of France, Limited*, [1909] 2 Ch. 484.

(*h*) *Anglo-Continental Supply Co.*, [1922] 2 Ch. 723.

APPENDIX A.

COMPANIES (CONSOLIDATION) ACT, 1908.

Section 26.—(1) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(*a*) The amount of the share capital of the company, and the number of the shares into which it is divided;

(*b*) The number of shares taken from the commencement of the company up to the date of the return;

(*c*) The amount called up on each share;

(*d*) The total amount of calls received;

(*e*) The total amount of calls unpaid;

(*f*) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return;

(*g*) The total number of shares forfeited;

(*h*) The total amount of shares or stock for which share warrants are outstanding at the date of the return;

(*i*) The total amount of share warrants issued and surrendered respectively since the date of the last return;

(*k*) The number of shares or amount of stock comprised in each share warrant;

(*l*) The names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called; and

(*m*) The total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July nineteen hundred and eight.

(3) The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance sheet need not include a statement of profit and loss.

(4) The above list and summary must be contained in

a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the registrar of companies a copy signed by the manager or by the secretary of the company.

(5) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Section 80.—(1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar of companies on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so filed.

Section 81.—(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who

is or has been engaged or interested in the formation of the company, must state—

(*a*) the contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

(*b*) the number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(*c*) the names, descriptions, and addresses of the directors or proposed directors; and

(*d*) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and

(*e*) the number and amount of shares and debentures which within the two preceding years have been issued or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and

(*f*) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by

the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

(*g*) the amount (if any) paid or payable as purchase money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

(*h*) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

(*i*) the amount or estimated amount of preliminary expenses; and

(*j*) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and

(*k*) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; and

(*l*) the names and addresses of the auditors (if any) of the company; and

(*m*) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or, otherwise for services rendered by him or by the firm in connexion with the promotion or formation of the company; and

(*n*) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(*a*) the purchase money is not fully paid at the date of issue of the prospectus; or

(*b*) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(*c*) the contract depends for its validity or fulfilment on the result of that issue.

(3) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

(4) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any

requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(*a*) as regards any matter not disclosed, he was not cognisant thereof; or

(*b*) the non-compliance arose from an honest mistake of fact on his part:

Provided that in the event of non-compliance with the requirements contained in paragraph (*m*) of subsection (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8) The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(9) Nothing in this section shall limit or diminish any

liability which any person may incur under the general law or this Act apart from this section.

Section 82.—(1) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July nineteen hundred and eight.

SECOND SCHEDULE.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

STATEMENT IN LIEU OF PROSPECTUS

filed by

LIMITED,

pursuant to section eighty-two of the Companies (Consolidation) Act, 1908.

Presented for filing by

THE COMPANIES (CONSOLIDATION) ACT, 1908.

LIMITED.

STATEMENT IN LIEU OF PROSPECTUS.

The nominal share capital of the company	£	
Divided into	Shares of £	each.
	,,	,,
	,,	,,

Names, descriptions, and addresses of directors or proposed directors.	
Minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid-up otherwise than in cash. The consideration for the intended issue of those shares and debentures.	1. shares of £ fully paid. 2. shares upon which £ per share credited as paid. 3. debenture £ 4. Consideration.
Names and addresses of (*a*) vendors of property purchased or acquired, or proposed to be (*b*) purchased or acquired by the company. Amount (in cash, shares, or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price £ Cash . . . . . £ Shares . . . . . £ Debentures . . . £ Goodwill . . . . £
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or Rate of the commission	Amount paid. „ payable. Rate per cent.
Estimated amount of preliminary expenses	£
Amount paid or intended to be paid to any promoter. Consideration for the payment.	Name of promoter. Amount £ Consideration:—

(*a*) For definition of vendor, *see* Section 81 (2) of the Companies (Consolidation) Act, 1908.

(*b*) *See* Section 81 (3) of the Companies (Consolidation) Act, 1908.

Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.	Nature of the provisions.

(Signatures of the persons above-named as directors or proposed directors, or of their agents authorised in writing.)

APPENDIX B.

STATUTORY RULES AND ORDERS, 1909.

Company, England. Companies (Winding-up).

THE COMPANIES (WINDING-UP) RULES, 1909, DATED MARCH 29, 1909, MADE PURSUANT TO THE COMPANIES (CONSOLIDATION) ACT, 1908 (8 EDW. 7, C. 69), AND THE JUDICATURE ACT, 1881 (44–5 V. C. 68).

PRELIMINARY.

1. *Application of rules.*—Subject to the limitation hereinafter mentioned these Rules shall apply to the proceedings in every Winding-up under the Act of a Company, which shall commence on and after the date on which these Rules come into operation, and they shall also, so far as practicable, and subject to any general or special order of the Court, apply to all proceedings which shall be taken or instituted after the said date, in the Winding-up of a Company which commenced on or after the first day of January, 1891. Rules which from their nature and subject matter are, or which by the head lines above the group in which they are contained or by their terms are made applicable only to the proceedings in a Winding-up by the Court, shall not apply to the proceedings in a Voluntary Winding-up, or Winding-up under the Supervision of the Court.

2. *Interpretation of terms.*—In these Rules, unless the context or subject-matter otherwise requires :—

"The Act" means the Companies (Consolidation) Act, 1908.

"The Company" means a company which is being wound-up or against which proceedings to have it wound-up have been commenced.

"Court" means the Court which has jurisdiction to wind-up the Company.

"Creditor" includes a corporation, and a firm of creditors in partnership.

"Gazetted" means published in the *London Gazette.*

"Judge" means in the High Court the Judge who for the

time being exercises the jurisdiction of the High Court to wind-up Companies, and in any Court the Judge thereof, or officer who exercises the powers of the Judge thereof.

"Liquidator" includes an Official Receiver when acting as Liquidator.

"Official Receiver" includes any officer appointed by the Board of Trade to discharge the duties of Official Receiver under the Act.

"Palatine Court" means one of the Chancery Courts of the counties Palatine of Lancaster and Durham.

"Proceedings" means the proceedings in the winding-up of a Company under the Act.

"Registrar" means in the High Court any of the Registrars in Bankruptcy of the High Court, and any person who shall be appointed to fill the office of Registrar under these Rules, and where a winding-up of a Company is in the District Registry of Liverpool or Manchester means the District Registrar; and in a County Court, where there are joint Registrars means either of such Registrars, or a Deputy Registrar, and in any Court other than the High Court, means the officer of the Court whose duty it is to exercise in relation to a winding-up the functions which in the High Court are exercised by a Registrar or Master.

"The Rules" means these Rules, and includes the prescribed Forms.

"Sealed" means sealed with the seal of the Court.

"Taxing Officer" means the officer of the Court whose duty it is to tax costs in the proceedings of the Court under its ordinary jurisdiction.

Words importing the masculine gender shall include females.

Words in the singular shall include the plural and words in the plural shall include the singular.

The expression "person" shall include any body of persons corporate or unincorporate.

Expressions referring to writing shall include printing, lithography, photography, and other methods of representing or reproducing words in a visible form.

3. *Use of forms in Appendix.*—(1) The forms in the Appendix, where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same, unless the Court shall otherwise direct.

(2) Provided that the Board of Trade may from time to time

alter any forms which relate to matters of an administrative and not of a judicial character, or substitute new forms in lieu thereof. Where the Board of Trade alters any form, or substitutes any new form in lieu of a form prescribed by these Rules, such altered or substituted form shall be published in the *London Gazette*.

COURT AND CHAMBERS.

4. *Office of Registrar in High Court.*—(1) All proceedings in the winding-up of Companies in the High Court shall from time to time be attached to one or more of the Registrars, who shall, together with the necessary clerks and officers, and subject to the Act and Rules, act under the general or special directions of the Judge.

(2) Every other Registrar may act for and in place of such Registrar as above-mentioned in all proceedings under the Acts and Rules, including the holding of public examinations, and when so acting such other Registrar shall be deemed to be the Registrar for the purposes of the Act and Rules.

(3) In every cause or matter within the jurisdiction of the Judge, whether by virtue of the Act, or by transfer, or otherwise, the Registrar shall, in addition to his powers and duties under the Rules, have all the powers and duties of a Master, Registrar, or Taxing Master.

5. *Matters in High Court to be heard in Court and Chambers.*—(1) The following matters and applications in the High Court shall be heard before the Judge in open Court :—

(*a*) Petitions.

(*b*) Appeals to the High Court from the Board of Trade and from the Official Receiver when acting as Official Receiver and not as Liquidator.

(*c*) Applications under section 223 of the Act.

(*d*) Applications by the Board of Trade under section 224 of the Act.

(*e*) Applications for the committal of any person to prison for contempt.

(*f*) Such matters and applications as the Judge may from time to time by any general or special orders direct to be heard before him in open Court.

(2) Examinations of persons summoned before the High Court under section 174 of the Act, shall be held in Court or in Chambers as the Court shall direct.

(3) Every other matter or application in the High Court under the Act to which the Rules apply may be heard and determined in Chambers.

6. *Proceeding in Courts other than High Court.*—(1) In Courts

other than the High Court the following matters and applications to the Court shall be heard in open Court :—

(*a*) Petitions.
(*b*) Public Examinations.
(*c*) Applications under sub-section (1) of section 217 of the Act.
(*d*) Applications to rectify the Register.
(*e*) Appeals from the Official Receiver and Board of Trade.
(*f*) Appeals from any decision or act of the Liquidator.
(*g*) Applications relating to the admission or rejection of proofs.
(*h*) Proceedings under section 215 of the Act.
(*i*) Applications under section 223 of the Act.
(*j*) Applications for the committal of any person to prison for contempt.
(*k*) Such matters and applications as the Judge may from time to time by any general or special orders direct to be heard before him in open Court.

(2) Any other matter or application may be heard and determined in Chambers.

7. *Applications in Chambers.*—Subject to the provisions of the Act and Rules in every Court :—

(1) The Registrar may under the general or special directions of the Judge hear and determine any application or matter which under the Act and Rules may be heard and determined in Chambers.
(2) Any matter or application before the Registrar may at any time be adjourned by him to be heard before the Judge either in Chambers or in Court.
(3) Any matter or application may, if the Judge or as the case may be, the Registrar, thinks fit be adjourned from Chambers to Court, or from Court to Chambers.

8. *Motions and Summonses. Form* 3.—(1) Every application in Court other than a petition, shall be made by motion, notice of which shall be served on every person against whom an order is sought, not less than two clear days before the day named in the notice for hearing the motion, which day must be one of the days appointed for the Sittings of the Court.

(2) Every application in Chambers shall be made by summons, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons.

9. *Place of Sitting of County Court.*—Subject to the orders of the Lord Chancellor the place of Sitting of each County Court having jurisdiction under the Act shall for the purposes of such jurisdiction, be the town and place in which the Court holds its Sittings

for the general business of the Court, under the County Courts Acts.

10. *Times for holding Courts other than the High Court.*—Subject to the provisions of the Act, the times of the Sitting of each Court, other than the High Court in matters of the winding-up of Companies shall be those which are appointed for the transaction of the general business of the Court, unless the Judge of any such Court shall otherwise order.

PROCEEDINGS.

11. *Title of proceedings. Forms* 1 *and* 2.—(1) Every proceeding in a winding-up matter shall be dated, and shall with any necessary additions, be intituled as follows :—

IN THE COURT

COMPANIES (WINDING-UP)

In the Matter of the Companies (Consolidation) Act, 1908.

with the name of the matter to which it relates. Numbers and dates may be denoted by figures.

(2) The first proceeding in every winding-up matter shall have a distinctive number assigned to it in the office of the Registrar, and all proceedings in any matter subsequent to the first proceeding shall bear the same number as the first proceeding.

12. *Written or printed proceedings.*—All proceedings shall be written or printed, or partly written or partly printed on paper of the size of 13 inches in length and 8 inches in breadth, or thereabouts, and must have a stitching margin ; but no objection shall be allowed to any proof or affidavit on account only of its being written or printed on paper of other size.

13. *Process to be sealed.*—All orders, summonses, petitions, warrants, process of any kind (including notices when issued by the Court) and office copies in any winding-up matter shall be sealed.

14. *Issue of summonses.*—Every summons in a winding-up matter in the High Court shall be prepared by the Applicant or his Solicitor, and issued from the office of the Registrar. A summons, when sealed, shall be deemed to be issued. The person obtaining the summons shall leave in the Registrar's office a duplicate which shall be stamped with the prescribed stamp and filed.

15. *Orders.*—Every order, whether made in Court or in Chambers in the winding-up of a Company shall be drawn up by the Registrar, unless in any proceeding, or classes of proceedings, the Judge or Registrar who makes the order shall direct that no order need be drawn up. Where a direction is given that no order need be drawn up, the note or memorandum of the order, signed or initialled by

the Judge or the Registrar making the order, shall be sufficient evidence of the order having been made.

16. *File of proceedings in office of Registrar (High Court).*—All petitions, affidavits, summonses, orders, proofs, notices, depositions, bills of costs and other proceedings in the High Court in a winding-up matter shall be kept and remain of record in the office of the Registrar and, subject to the directions of the Court, shall be placed in one continuous file, and no proceeding in any winding-up matter shall be filed in the Central Office.

17. *File of proceedings in Courts other than High Court.*—In Courts other than the High Court a file of proceedings in every winding-up matter shall be kept on which, subject to the directions of the Court, all petitions, affidavits, summonses, orders, proofs, notices, depositions, and other proceedings in the matter shall be placed and remain of record as far as possible in continuous order.

18. *Office copies.*—In every Court all office copies of petitions, affidavits, depositions, papers and writings, or any parts thereof, required by the Official Receiver or any liquidator, contributory, creditor, officer of a Company, or other person entitled thereto, shall be provided by the Registrar, and shall, except as to figures, be fairly written out at length, and be sealed and delivered out without any unnecessary delay, and in the order in which they shall have been bespoken.

19. *Inspection of file.*—Every person who has been a director or officer of a Company which is being wound up, and every duly authorised officer of the Board of Trade, shall be entitled, free of charge, and every contributory and every creditor whose claim or proof has been admitted, shall be entitled on payment of a fee of one shilling for each hour or part of an hour occupied, at all reasonable times, to inspect the file of proceedings and to take copies or extracts from any document therein, or to be furnished with such copies or extracts at a rate not exceeding fourpence per folio of seventy-two words.

20. *Use of file by Board of Trade and Official Receiver.*—Where, in the exercise of their functions under the Act or Rules, the Board of Trade or the Official Receiver requires to inspect or use the file of proceedings the Registrar shall (unless the file is at the time required for use in Court or by him) on request, transmit the file of proceedings to the Board of Trade or Official Receiver, as the case may be.

21. *Defacement of Stamps.*—Every officer of a Court who shall receive any document to which an adhesive stamp shall be affixed, shall immediately upon receipt of the document deface the stamp thereon, in the High Court in such manner as the Commissioners of Inland Revenue may from time to time direct, and in any other

Court by writing partly on the stamp and partly on the document the name of the matter, or in such other manner as the Commissioners of Inland Revenue may from time to time direct, and no such document shall be filed or delivered until the stamp thereon shall have been defaced in manner aforesaid; and it shall be the duty of the party presenting or receiving such document to see that the defacement hereby prescribed has been duly made.

SERVICE AND EXECUTION OF PROCESS AND ENFORCEMENT OF ORDERS.

22. *Duties of Bailiff in County Court.*—(1) It shall be the duty of the High Bailiff of a County Court to serve such orders, summonses, petitions and notices as the Court may require him to serve; to execute warrants and other process; to attend any sittings of the Court (but not sittings in Chambers); and to do and perform all such things as may be required of him by the Court.

(2) But this rule shall not be construed to require any order, summons, petition, or notice to be served by a bailiff or officer of the Court which is not specially by the Act or Rules required to be so served, unless the Court in any particular proceeding by order specially so directs.

23. *Service.*—(1) All notices, summonses, and other documents other than those of which personal service is required, may be sent by prepaid post letter to the last known address of the person to be served therewith; and the notice, summons, or document shall be considered as served at the time that the same ought to be delivered in the due course of post by the post office, and notwithstanding the same may be returned by the post office.

(2) No service shall be deemed invalid by reason that the name, or any of the names other than the surname of the person to be served, has been omitted from the document containing the person's name, provided that the Court is satisfied that in other respects the service of the document has been sufficient.

24. *Enforcement of orders.*—(1) Every order of a Court having jurisdiction to wind up a Company, made in the exercise of the powers conferred by the Acts and Rules, may be enforced by such Court as if it were a judgment or order of the Court made in the exercise of its ordinary jurisdiction.

(2) Every such order of a County Court, and every process issued therein may be enforced, executed and dealt with not only by such Court, but by any County Court, whether such County Court has or has not jurisdiction to wind up a Company, as if such order or process were made or issued for the enforcement of a judgment or order made by such last mentioned Court in the exercise of its ordinary jurisdiction.

PETITION.

25. *Form of petition. Forms* 4 *and* 5.—Every petition for the winding-up of a Company by the Court, or subject to the supervision of the Court, shall be in the Forms Nos. 4 and 5 in the Appendix with such variations as circumstances may require.

26. *Presentation of petition.*—A petition shall be presented at the office or chambers of the Registrar, who shall appoint the time and place at which the petition is to be heard. Notice of the time and place appointed for hearing the petition shall be written on the petition and sealed copies thereof, and the Registrar may at any time before the Petition has been advertised, alter the time appointed, and fix another time.

27. *Advertisement of petition. Form* 6.—Every petition shall be advertised seven clear days before the hearing as follows :—

(1) In the case of a Company whose registered office, or if there shall be no such office, then whose principal or last known principal place of business is or was situate within ten miles of the principal entrance of the Royal Courts of Justice once in the *London Gazette*, and once at least in one London daily morning newspaper, or in such other newspaper as the Court directs.

(2) In the case of any other Company, once in the *London Gazette*, and once at least in one local newspaper circulating in the district where the registered office, or principal or last known principal place of business, as the case may be, of such Company is or was situate, or in such other newspaper as shall be directed by the Court.

(3) The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any), and shall contain a note at the foot thereof, stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitors or London agent, within the time and manner prescribed by Rule 33, and an advertisement of a petition for the winding-up of a Company by the Court which does not contain such a note shall be deemed irregular.

And if the Petitioner or his Solicitor does not within the time hereby prescribed or within such extended time as the Registrar may allow duly advertise the Petition in the manner prescribed by the said Rule the appointment of the time and place at which the Petition is to be heard shall be cancelled by the Registrar and the Petition shall be removed from the file in the Companies

(Winding-up) Office unless the Judge or the Registrar shall otherwise direct.

28. *Service of petition. Forms* 7 *and* 8.—Every petition shall, unless presented by the Company, be served upon the Company at the registered office, if any, of the Company, and if there is no registered office, then at the principal or last known principal place of business of the Company, if any such can be found, by leaving a copy with any member, officer, or servant of the Company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member or members of the Company as the Court may direct; and where the Company is being wound up voluntarily, the petition shall also be served upon the Liquidator (if any), appointed for the purpose of winding-up the affairs of the Company.

29. *Verification of petition. Form* 9.—Every petition for the winding-up of a Company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *primâ facie* evidence of the statements in the petition.

30. *Copy of petition to be furnished to creditor or contributory.*—Every contributory or creditor of the Company shall be entitled to be furnished, by the solicitor of the petitioner with a copy of the petition, within 24 hours after requiring same, on paying the rate of 4*d.* per folio of 72 words for such copy.

OFFICIAL RECEIVER AS PROVISIONAL LIQUIDATOR.

31. *Appointment of Provisional Liquidator.*—(1) After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the Company, and upon proof by affidavit of sufficient grounds for the appointment of the Official Receiver as Provisional Liquidator, the Court, if it thinks fit, and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment.

(2) *Form* 10.—The order appointing the Official Receiver to be Provisional Liquidator, shall bear the number of the petition, and shall state the nature and a short description of the property of which the Official Receiver is ordered to take possession, and the duties to be performed by the Official Receiver.

(3) Subject to any Order of the Court, if no order for the winding-up of the Company is made upon the Petition, or if an order for the

winding-up of the Company on the Petition is rescinded, or if all proceedings on the petition are stayed, or if an order is made continuing the voluntary winding-up of the Company subject to the supervision of the Court, the Official Receiver as Provisional Liquidator shall be entitled to be paid, out of the property of the Company, all the costs, charges, and expenses properly incurred by him as Provisional Liquidator, including the fees payable to the Board of Trade under the scale of fees in force for the time being, and may retain out of such property the amounts of such costs, charges, expenses, and fees.

HEARING OF PETITIONS AND ORDERS MADE THEREON.

32. *Attendance before hearing to show compliance with rules.*—After a petition has been presented, the petitioner, or his Solicitor shall, on a day to be appointed by the Registrar, attend before the Registrar and satisfy him that the petition has been duly advertised that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the provisions of the Rules as to petitions for winding-up Companies have been duly complied with by the petitioner. No order for the winding-up of a Company shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the Registrar at the time appointed, and satisfied him in manner required by this Rule.

33. *Notice by persons who intend to appear. Form* 11.—Every person who intends to appear on the hearing of a petition shall serve on, or send by post to, the petitioner, or his solicitor or London agent, at the address stated in the advertisement of the petition, notice of his intention. The notice shall contain the address of such person, and shall be signed by him or by his solicitor or London agent, and shall be served, or if sent by post shall be posted in such time as in ordinary course of post to reach the address not later than six o'clock in the afternoon of the day previous to the day appointed for the hearing of the petition. The notice may be in Form 11 with such variations as circumstances may require. A person who has failed to comply with this Rule shall not, without the special leave of the Court, be allowed to appear on the hearing of the petition.

34. *List of names and addresses of persons who appear on the petition. Form* 12.—The petitioner, or his solicitor or London agent, shall prepare a list of the names and addresses of the persons who have given notice of their intention to appear on the hearing of the petition, and of their respective solicitors, which shall be in Form 12. On the day appointed for the hearing the petition a fair copy of the

list (or if no notice of intention to appear has been given a statement in writing to that effect) shall be handed by the petitioner, or his solicitor or London agent, to the Court prior to the hearing of the petition.

35. *Affidavits in opposition and reply.*—(1) Affidavits in opposition to a petition that a Company may be wound up under the order or subject to the supervision of the Court shall be filed within seven days of the date on which the affidavit verifying the petition is filed, and notice of the filing of every affidavit in opposition to such a petition shalll be given to the petitioner or the solicitor or London agent of the petitioner, on the day on which the affidavit is filed.

(2) An affidavit in reply to an affidavit filed in opposition to a petition shall be filed within three days of the date on which notice of such affidavit is received by the petitioner or the solicitor or London agent of the petitioner.

36. *Substitution of creditor or contributory for withdrawing petitioner.*—When a petitioner consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned, or, if appearing, does not apply for an order in the terms of the prayer of his petition, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the Court would have a right to present a petition, and who is desirous of prosecuting the petition.

ORDER TO WIND-UP A COMPANY.

37. *Notice that winding-up order has been pronounced to be given to Official Receiver.*—When an order for the winding-up of a Company, or for the appointment of the Official Receiver as Provisional Liquidator prior to the making of an order for the winding-up of the Company, has been pronounced in Court, the Registrar shall, on the same day, send to the Official Receiver a notice informing him that the order has been pronounced.

Forms 13 *and* 14.—The notice may be in Forms 13 and 14 respectively, with such variations as circumstances may require.

38. *Documents for drawing up order to be left with Registrar.*—It shall be the duty of the petitioner, or his solicitor or London agent, and of all other persons who have appeared on the hearing of the petition, at latest on the day following the day on which an order for the winding-up of a Company is pronounced in Court, to leave at the Registrar's office all the documents required for the purpose of enabling the Registrar to complete the order forthwith.

39. *No appointment for settling order.*—It shall not be necessary for the Registrar to make an appointment to settle the order, unless in any particular case the special circumstances make an appointment necessary.

40. *Contents of winding-up order. Form* 15.—An order to wind up a Company shall contain at the foot thereof a notice stating that it will be the duty of the person who is at the time Secretary or chief officer of the Company, and of such of the persons who are liable to make out or concur in making out the Company's statement of affairs as the Official Receiver may require, to attend on the Official Receiver forthwith on the service of the order at the place mentioned therein.

41. *Transmission and advertisement of winding-up order.*—(1) When an order that a Company be wound up, or for the appointment of the Official Receiver as Provisional Liquidator has been made :—

(*a*) Three copies of the order sealed with the seal of the Court shall forthwith be sent by post or otherwise by the Registrar to the Official Receiver.

(*b*) The Official Receiver shall cause a sealed copy of the order to be served upon the Secretary or other Chief Officer of the Company at the registered office of the Company (if any), or upon such other person or persons, or in such other manner as the Court may direct, and if the order is that the Company be wound up by the Court, shall forward to the Registrar of Companies the copy of the order which by Section 143 of the Act is directed to be so forwarded by the Company.

(*c*) The official Receiver shall forthwith give notice of the order to the Board of Trade, who shall forthwith cause the notice to be gazetted.

(*d*) *Form* 17.—The Official Receiver shall forthwith send notice of the order to such local paper as the Board of Trade may from time to time direct, or, in default of such direction, as he may select.

(2) *Form* 16.—An order for the winding-up of a Company, subject to the supervision of the Court, shall before the expiration of twelve days from the date thereof be advertised by the petitioner, once in the *London Gazette*, and shall be served on such persons (if any) and in such manner as the Court shall direct.

TRANSFERS OF ACTIONS AND PROCEEDINGS.

42. *Transfer of actions.*—(1) Where an order has been made in the High Court for the winding-up of a Company the Judge shall have power, without further consent, to order the transfer to him

of any action, cause or matter pending in any other Court or Division brought or continued by or against the Company, and any action or proceeding by a mortgagee or debenture holder of the Company against the Company, for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against the Company's assets or property, which is pending in the High Court or before any Judge thereof shall without further order be transferred to the Judge of the High Court. In the case of applications in Chambers in actions so transferred where the practice in winding-up is different from the practice in the Chancery Division the practice in winding-up shall prevail.

(2) Where any action brought by or against a Company against which a winding-up order has been made is transferred to the Judge of the High Court, the Registrar may, under the general or special directions of the Judge, hear, determine and deal with any application, matter, or proceeding which, if the action had not been transferred, would have been determined in Chambers. These provisions shall apply to the proceedings in any action in which by the Rules of the Supreme Court or otherwise the Chamber proceedings are directed to be dealt with by the Registrar.

43. *Transfer of proceedings by Judge of High Court. Form* 18.—The Judge of the High Court may at any time, for good cause shown, order the proceedings in any Court other than the High Court to be transferred to the High Court, or any proceedings in the High Court to be transferred from the High Court to any other Court.

44. *Transfer of proceedings by Judge of Court other than High Court or Palatine Court. Form* 18.—The Judge of any Court, other than the High Court or a Palatine Court, may at any time, for good cause shown, order any proceedings which have been commenced or are pending in his Court to be transferred to any Court which has jurisdiction to order the winding-up of a Company, not being the High Court or a Palatine Court.

45. *Notice of application to Official Receiver.*—In a winding-up by the Court, notice of an application for a transfer of proceedings shall before the hearing thereof, be served by the applicant on the Official Receiver of the Court in which the proceedings are pending and on the Official Receiver of the Court to which the proceedings are sought to be transferred.

46. *Procedure where proceedings transferred. Form* 19.—When an order for the transfer of proceedings has been made :—

(1) The person on whose application the transfer has been made shall lodge with the Registrar of the Court to which the proceedings are transferred a sealed copy of the order of transfer.

(2) In a winding-up by the Court the Official Receiver of the

Court to which the proceedings are transferred shall become the Official Receiver in the proceedings.

(3) The records of the proceedings shall be transmitted to the Registrar of the Court to which the proceedings are transferred, and in a winding-up by the Court such Registrar, as soon as he has received the records, shall give notice of the transfer to the Official Receiver of his Court, who shall give notice of the transfer to the Board of Trade.

(4) The proceedings shall receive a new distinctive number.

47. *Transfer of jurisdiction of County Court.*—Whenever the Lord Chancellor, by order under his hand, shall exclude any County Court from having jurisdiction under the Act, or shall attach the district or any part of the district of a County Court to the High Court, or any other County Court, or shall detach the district or any part of the district of any County Court from the district and jurisdiction of the High Court, any winding-up matters pending in the Court or district to which the order relates shall become transferred to such Court as shall be mentioned for the purpose in the order; and, thereupon, the Rules as to transfer of proceedings shall apply to the transfer of such pending proceedings in all respects as if the proceedings had been transferred by order of a Court having power to transfer proceedings.

SPECIAL MANAGER.

48. *Appointment of Special Manager.*—(1) An application by the Official Receiver for the appointment of a special manager shall be supported by a report of the Official Receiver, which shall be placed on the file of proceedings, and in which shall be stated the amount of remuneration which, in the opinion of the Official Receiver, ought to be allowed to the special manager. No affidavit by the Official Receiver in support of the application shall be required.

(2) The remuneration of the special manager shall, unless the Court otherwise in any special case directs, be stated in the order appointing him, but the Court may at any subsequent time for good cause shown make an order for the payment to the special manager of further remuneration.

(3) A copy of the order appointing a special manager shall be transmitted to the Board of Trade by the Official Receiver.

49. *Accounting by Special Manager. Form* 20.—Every special manager shall account to the Official Receiver, and the special manager's accounts shall be verified by affidavit, and, when approved by the Official Receiver, the totals of the receipts and payments shall be added by the Official Receiver to his accounts.

STATEMENT OF AFFAIRS.

50. *Preparation of statement of affairs. Form* 26.—(1) Every person who under section 147 of the Act, has been required by the Official Receiver to submit and verify a statement as to the affairs of the Company, shall be furnished by the Official Receiver with forms and instructions for the preparation of the statement. The statement shall be made out in duplicate, one copy of which shall be verified by affidavit. The Official Receiver shall cause to be filed with the Registrar the verified statement of affairs (*a*).

(2) The Official Receiver may from time to time hold personal interviews with every such person for the purpose of investigating the Company's affairs, and it shall be the duty of every person to attend on the Official Receiver at such time and place as the Official Receiver may appoint and give the Official Receiver all information that he may require.

51. *Extension of time for submitting statement of affairs.*—When any person requires any extension of time for submitting the statement of affairs, he shall apply to the Official Receiver, who may, if he thinks fit, give a written certificate extending the time, which certificate shall be filed with the proceedings in the winding-up and shall render an application to the Court unnecessary.

52. *Information subsequent to statement of affairs.*—After the statement of affairs of a Company has been submitted to the Official Receiver it shall be the duty of each person who has made or concurred in making it, if and when required, to attend on the Official Receiver and answer all such questions as may be put to him, and give all such further information as may be required of him by the Official Receiver in relation to the Statement of Affairs.

53. *Default.*—Any default in complying with the requirements of section 147 of the Act, may be reported by the Official Receiver to the Court.

54. *Expenses of statement of affairs.*—A person who is required to make or concur in making any statement of affairs of a Company shall, before incurring any costs or expenses in and about the preparation and making of the statement, apply to the Official Receiver for his sanction, and submit a statement of the estimated costs and expenses which it is intended to incur; and, except by order of the Court, no person shall be allowed out of the assets of the Company any costs or expenses which have not before being incurred been sanctioned by the Official Receiver.

(*a*) Revoked 1921—see new rule 50, p. 368.

APPOINTMENT OF LIQUIDATOR IN A WINDING-UP BY THE COURT.

55. *Appointment of Liquidator on report of meetings of creditors and contributories. Form* 27.—(1) As soon as possible after the first meetings of creditors and contributories have been held the Official Receiver, or the Chairman of the meeting, as the case may be, shall report the result of each meeting to the Court.

(2) Upon the result of the meetings of creditors and contributories being reported to the Court, the Court may, if the meeting of creditors and the meeting of contributories have each passed the same resolutions, or if the resolutions passed at the two meetings are identical in effect, upon the application of the Official Receiver, forthwith make the appointments necessary for giving effect to such resolutions. In any other case the Court shall, on the application of the Official Receiver, fix a time and place for considering the resolutions and determinations (if any) of the meetings, deciding differences (if any), and making such order as shall be necessary.

(3) When a time and place have been fixed for the consideration of the resolutions and determinations of the meetings, such time and place shall be advertised by the Official Receiver in such manner as the Court shall direct, but so that the first or only advertisement shall be published not less than seven days before the time so fixed.

(4) Upon the consideration of the resolutions and determinations of the meetings the Court shall hear the Official Receiver and any creditor or contributory.

(5) *Forms* 28 *and* 103 (7).—If a Liquidator is appointed a copy of the order appointing him shall be transmitted to the Board of Trade by the Official Receiver, and the Board of Trade shall, as soon as the Liquidator has given security, cause notice of the appointment to be gazetted. The expense of gazetting the notice of the appointment shall be paid by the Liquidator, but may be charged by him on the assets of the Company.

(6) *Form* 30.—Every appointment of a Liquidator or Committee of Inspection shall be advertised by the Liquidator in such manner as the Court directs immediately after the appointment has been made, and the Liquidator has given the required security.

(7) If a Liquidator in a winding-up by the Court shall die, or resign, or be removed, another Liquidator may be appointed in his place in the same manner as in the case of a first appointment, and the Official Receiver shall, on the request of not less than one-tenth in value of the creditors or contributories summon meetings for the purpose of determining whether or not the vacancy shall be filled; but none of the provisions of this Rule shall apply

where the Liquidator is released under section 157 of the Act, in which case the Official Receiver shall remain Liquidator.

56. *Style of Official Receiver when he is Liquidator.*—When the Official Receiver is Liquidator of a Company he shall be styled "Official Receiver and Liquidator."

SECURITY BY LIQUIDATOR OR SPECIAL MANAGER IN A WINDING-UP BY THE COURT.

57. *Standing Security to Board of Trade.*—In the case of a Special Manager or a Liquidator other than the Official Receiver, the following provisions as to security shall have effect, namely:—

(1) The security shall be given to such officers or persons, and in such manner as the Board of Trade may from time to time direct.

(2) It shall not be necessary that security shall be given in each separate winding-up; but security may be given either specially in a particular winding-up, or generally, to be available for any winding-up in which the person giving security may be appointed, either as Liquidator or Special Manager.

(3) The Board of Trade shall fix the amount and nature of such security, and may from time to time, as they think fit, either increase or diminish the amount of special or general security which any person has given.

(4) *Form* 29.—The certificate of the Board of Trade that a Liquidator or Special Manager has given security to their satisfaction shall be filed with the Registrar.

(5) The cost of furnishing the required security by a Liquidator or Special Manager, including any premiums which he may pay to a Guarantee Society, shall be borne by him personally, and shall not be charged against the assets of the Company as an expense incurred in the winding-up.

58. *Failure to give or keep up security.*—(1) If a Liquidator or Special Manager fails to give the required security within the time stated for that purpose in the order appointing him, or any extension thereof, the Official Receiver shall report such failure to the Court, who may thereupon rescind the order appointing the Liquidator or Special Manager.

(2) If a Liquidator or Special Manager fails to keep up his security, the Official Receiver shall report such failure to the Court, who may thereupon remove the Liquidator or Special Manager, and make such order as to costs as the Court shall think fit.

(3) Where an order is made under this Rule rescinding an order

for the appointment of or removing a Liquidator, the Court may direct that another Liquidator is to be appointed, and thereupon the same meetings shall be summoned and the same proceedings may be taken as in the case of a first appointment of a Liquidator.

PUBLIC EXAMINATION.

59. *Report of Official Receiver to be filed.*—A report made by the Official Receiver pursuant to section 148 of the Act shall state, in a narrative form, the facts and matters which the Official Receiver desires to bring to the notice of the Court, and his opinion as required by the said section.

60. *Appointment of time for consideration of report.*—The Official Receiver may apply to the Court to fix a day for the consideration of the report, and on such application the Court shall appoint a day on which the report shall be considered.

61. *Consideration of report.*—The consideration of the report shall be before the Judge of the Court personally in Chambers, and the Official Receiver shall personally, or by Counsel or Solicitor, attend the consideration of the report, and give the Court any further information or explanation with reference to the matters stated in the report which the Court may require.

62. *Procedure consequent on order for public examination. Form* 31.—Where the Judge makes an order under section 175 of the Act, directing any person or persons to attend for public examination :—

(*a*) The examination shall be held before the Judge. Provided that in the High Court the Judge may direct that the whole or any part of the examination of any such person or persons be held before the Registrar, or before any of the persons mentioned in sub-section 9 of the said section.

(*b*) The Judge may, if he thinks fit, either in the order for examination, or by any subsequent order, give directions as to the special matters on which any such person is to be examined.

(*c*) Where on an examination held before the Registrar, or one of the persons mentioned in sub-section 9 of the said section, he is of opinion that such examination is being unduly or unnecessarily protracted, or for any other sufficient cause, he may adjourn the examination of any person, or any part of the examination, to be held before the Judge.

63. *Application for day for holding examination.*—Upon an order directing a person to attend for public examination being made,

the Official Receiver shall apply for the appointment of a day on which the public examination is to be held.

64. *Appointment of time and place for public examination. Forms* 32 *and* 33.—A day and place shall be appointed for holding the public examination, and notice of the day and place so appointed shall be given by the Official Receiver to the person who is to be examined by sending such notice in a registered letter addressed to his usual or last known address.

65. *Notice of public examination to creditors and contributories.*—(1) The Official Receiver shall give notice of the time and place appointed for holding a public examination to the creditors and contributories by advertisement in such newspapers as the Board of Trade from time to time direct, or in default of any such direction as the Official Receiver thinks fit, and shall also forward notice of the appointment to the Board of Trade to be gazetted.

(2) Where an adjournment of the public examination has been directed, notice of the adjournment shall not, unless otherwise directed by the Court, be advertised in any newspaper, but it shall be sufficient to publish in the *Gazette* a notice of the time and place fixed for the adjourned examination.

66. *Default in attending. Form* 40.—(1) If any person who has been directed by the Court to attend for public examination fails to attend at the time and place appointed for holding or proceeding with the same, and no good cause is shown by him for such failure, or if before the day appointed for the examination the Official Receiver satisfies the Court that such person has absconded, or that there is reason for believing that he is about to abscond with the view of avoiding examination, it shall be lawful for the Court, upon its being proved to the satisfaction of the Court that notice of the order and of the time and place appointed for attendance at the public examination was duly served, without any further notice, to issue a warrant for the arrest of the person required to attend, or to make such other order as the Court shall think just.

(2) *Warrants of arrest.*—A warrant of arrest issued by the High Court under this Rule shall be issued in the Central Office of the Supreme Court pursuant to an order of the Court directing such issue.

67. *Notes of examination to be filed. Forms* 36 *and* 37.—The notes of every public examination shall, after being signed as required by section 175 (7) of the Act, be filed with the Registrar.

PROCEEDINGS AGAINST DELINQUENT DIRECTORS, PROMOTERS, AND OFFICERS.

68. *Application against delinquent directors, officers, and promoters.*—(1) An application under section 215 of the Act shall in

any Court other than the High Court be made by motion to the Court. In the High Court the application shall be made by a summons returnable in the first instance in Chambers, in which summons shall be stated the nature of the declaration or order for which application is made, and the grounds of the application, and which summons, unless otherwise ordered by the Court, shall be served, in the manner in which an originating summons is required by the Rules of the Supreme Court to be served, on every person against whom an order is sought, not less than eight days before the day named in the summons for hearing the application. Where the application is made by the Official Receiver or Liquidator he may make a report to the Court stating any facts and information on which he proceeds which are verified by affidavit, or derived from sworn evidence in the proceedings. Where the application is made by any other person it shall be supported by affidavit to be filed by him.

(2) On the return of the summons the Court may give such directions as it shall think fit for the hearing of the summons before the Judge in Court, the taking of evidence wholly or in part by affidavit or orally, and the cross-examination either before the Judge on the hearing in Court or in Chambers of any deponents to affidavits in support of or in opposition to the application.

69. *Notice of application.*—Where the application is made by motion, notice of the intended motion shall be served on every person against whom an order is sought, not less than eight days before the day named in the notice for hearing the motion. A copy of every report and affidavit intended to be used in support of the motion shall be served on every person to whom notice of motion is given not less than four days before the hearing of the motion.

70. *Use of depositions taken at public examinations.*—Where in the course of the proceedings in a winding-up by the Court an order has been made for the public examination of persons named in the order pursuant to section 175 of the Act, and it appears from the examination that the persons examined, or some of them, have misapplied, or retained, or become liable, or accountable for moneys or property of the Company, or been guilty of misfeasance or breach of trust in relation to the Company, then in any proceedings subsequently instituted under section 215 of the Act, for the purpose of examining into the conduct of the said persons, or any of them, and compelling repayment or restoration to the Company of any moneys or property, or contribution by way of compensation to the assets of the Company by such persons or any of them, the verified notes of the examination of each person who was examined under the order shall, subject as hereinafter mentioned, and to any order or directions of the Court as to the manner and extent in and

to which the notes shall be used, and subject to all just exceptions to the admissibility in evidence against any particular person or persons of any of the statements contained in the notes of the examinations, be admissible in evidence against any of the persons against whom the application is made, who, under section 175 of the Act, and the order for the public examination, was or had the opportunity of being present at and taking part in the examination. Provided that before any such notes of a public examination shall be used on any such application, the person intending to use the same shall, not less than fifteen days before the day appointed for hearing the application, give notice of such intention to each person against whom it is intended to use such notes, or any of them, specifying the notes or parts of the notes which it is intended to read against him, and furnish him with copies of such notes, or parts of notes (except notes of the person's own depositions), and provided also that every person against whom the application is made shall be at liberty to cross-examine or re-examine (as the case may be) any person the notes of whose examination are read, in all respects as if such person had made an affidavit on the application.

WITNESSES AND DEPOSITIONS.

71. *Shorthand Notes. Forms* 34 *and* 35.—If the Court or the officer of the Court before whom any examination under the Act and Rules is directed to be held shall in any case, and at any stage of the proceedings, be of opinion that it would be desirable that a person (other than the person before whom an examination is taken) should be appointed to take down the evidence of any person examined in shorthand or otherwise, it shall be competent for the Court or officer aforesaid to make such appointment. The person at whose instance the examination is taken shall nominate a person for the purpose, and the person so nominated shall be appointed, unless the Court or officer holding the examination shall otherwise order. Every person so appointed shall be paid a sum not exceeding one guinea a day, and a sum not exceeding 8*d.* per folio of 90 words for any transcript of the evidence that may be required, and such sums shall be paid by the party at whose instance the appointment was made, or out of the assets of the Company as may be directed by the Court.

72. *Committal of contumacious witness. Form* 38.—(1) If a person examined before a Registrar or other officer of the Court who has no power to commit for contempt of Court, refuses to answer to the satisfaction of the Registrar or officer any question which he may allow to be put, the Registrar or officer shall report such refusal to the Judge, and upon such report being made the

person in default shall be in the same position, and be dealt with in the same manner as if he had made default in answering before the Judge.

(2) The report shall be in writing, but without affidavit, and shall set forth the question put, and the answer (if any) given by the person examined.

(3) The Registrar or other officer shall, before the conclusion of the examination at which the default in answering is made, name the time when and the place where the default will be reported to the Judge, and upon receiving the report the Judge may take such action thereon as he shall think fit. If the Judge is sitting at the time when the default in answering is made, such default may be reported immediately.

73. *Depositions at private examinations.*—(1) The Official Receiver may attend in person, or by an assistant Official Receiver, any examination of a witness under section 174 of the Act, on whosesoever application the same has been ordered, and may take notes of the examination for his own use, and put such questions to the persons examined as the Court may allow.

(2) The notes of the depositions of a person examined under section 174 of the Act, or under any order of the Court before the Court, or before any officer of the Court, or person appointed to take such an examination (other than the notes of the depositions of a person examined at a public examination under section 175 of the Act) shall not be filed, or be open to the inspection of any creditor, contributory, or other person, except the Official Receiver or Liquidator, unless and until the Court shall so direct, and the Court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies of or extracts therefrom.

ARRANGEMENTS WITH CREDITORS AND CONTRIBUTORIES IN A WINDING-UP BY THE COURT.

74. *Report by Official Receiver on arrangements and compromises.*—In a winding-up by the Court if application is made to the Court to sanction any compromise or arrangement the Court may, before giving its sanction thereto, hear a report by the Official Receiver as to the terms of the scheme, and as to the conduct of the directors and other officers of the Company, and as to any other matters which, in the opinion of the Official Receiver or the Board of Trade, ought to be brought to the attention of the Court. The report shall not be placed upon the file, unless and until the Court shall direct it to be filed.

COLLECTION AND DISTRIBUTION OF ASSETS IN A WINDING-UP BY THE COURT.

75. *Collection and distribution of Company's assets by Liquidator.*—(1) The duties imposed on the Court by section 163 (1) of the Act, in a winding-up by the Court with regard to the collection of the assets of the Company and the application of the assets in discharge of the Company's liabilities shall be discharged by the Liquidator as an officer of the Court subject to the control of the Court.

(2) For the purpose of the discharge by the Liquidator of the duties imposed by section 163 (1) of the Act, and Sub-rule (1) of this Rule, the Liquidator in a winding-up by the Court shall for the purpose of acquiring or retaining possession of the property of the Company, be in the same position as if he were a Receiver of the property appointed by the High Court, and the Court may, on his application, enforce such acquisition or retention accordingly.

76. *Power of Liquidator to require delivery of the property. Form* 41.—The powers conferred on the Court by section 164 of the Act shall be exercised by the Liquidator. Any contributory for the time being on the list of contributories, trustee, receiver, banker or agent or officer of a Company which is being wound up under order of the Court shall, on notice from the Liquidator and within such time as he shall by notice in writing require, pay, deliver, convey, surrender or transfer to or into the hands of the Liquidator any sum of money or balance, books, papers, estate or effects which happen to be in his hands for the time being and to which the Company is *primâ facie* entitled.

LIST OF CONTRIBUTORIES IN A WINDING-UP BY THE COURT.

77. *Liquidator to settle list of contributories. Form* 42.—The Liquidator shall with all convenient speed after his appointment settle a list of contributories of the Company, and shall appoint a time and place for that purpose. The list of contributories shall contain a statement of the address of, and the number of shares or extent of interest to be attributed to each contributory, and shall distinguish the several classes of contributories. As regards representative contributories the Liquidator shall, so far as practicable, observe the requirements of section 163 (2) of the Act.

78. *Appointment of time and place for the settlement of list. Forms* 43 *and* 44.—The Liquidator shall give notice in writing of the time and place appointed for the settlement of the list of contributories to every person whom he proposes to include in the list, and shall state in the notice to each person in what character and for what

number of shares or interest he proposes to include such person in the list.

79. *Settlement of list of contributories. Form* 45.—On the day appointed for settlement of the list of contributories the Liquidator shall hear any person who objects to being settled as a contributory, and after hearing shall finally settle the list, which when so settled shall be the list of contributories of the Company.

80. *Notice to contributories. Form* 46.—The Liquidator shall forthwith give notice to every person whom he has finally placed on the list of contributories stating in what character and for what number of shares or interest he has been placed on the list, and in the notice inform such person that any application for the removal of his name from the list, or for a variation of the list, must be made to the Court by summons within 21 days from the date of the service on the contributory or alleged contributory of notice of the fact that his name is settled on the list of contributories.

81. *Application to the Court to vary the list. Form* 49.—(1) Subject to the power of the Court to extend the time or to allow an application to be made notwithstanding the expiration of the time limited for that purpose, no application to the Court by any person who objects to the list of contributories as finally settled by the Liquidator shall be entertained after the expiration of 21 days from the date of the service on such person of notice of the settlement of the list.

(2) The Official Receiver shall not in any case be personally liable to pay any costs of or in relation to an application to set aside or vary his act or decision settling the name of a person on the list of contributories of a Company.

82. *Variation of or addition to list of contributories. Form* 47.—The Liquidator may from time to time vary or add to the list of contributories, but any such variation or addition shall be made in the same manner in all respects as the settlement of the original list.

CALLS.

83. *Calls by Liquidator.*—The powers and duties of the Court in relation to making calls upon contributories conferred by section 166 of the Act, shall and may be exercised, in a winding-up by the Court, by the Liquidator as an officer of the Court subject to the proviso to section 173 of the Act, and to the following regulations :—

(1) *Form* 50.—Where the Liquidator desires to make any call on the contributories, or any of them for any purpose authorised by the Act, if there is a Committee of Inspection he may summon a meeting of such Committee for the purpose of obtaining their sanction to the intended call.

(2) *Form* 51.—The notice of the meeting shall be sent to each member of the Committee of Inspection in sufficient time to reach him not less than seven days before the day appointed for holding the meeting, and shall contain a statement of the proposed amount of the call, and the purpose for which it is intended. Notice of the intended call and the intended meeting of the Committee of Inspection shall also be advertised once at least in a London newspaper, or, where the winding-up is not in the High Court, in a newspaper circulating in the district of the Court in which the proceedings are pending. The advertisement shall state the time and place of the intended meeting of the Committee of Inspection, and that each contributory may either attend the said meeting and be heard, or make any communication in writing to the Liquidator or members of the Committee of Inspection to be laid before the meeting, in reference to the said intended call.

(3) At the meeting of the Committee of Inspection any statements or representations made either to the meeting personally or addressed in writing to the Liquidator or members of the Committee by any contributory shall be considered before the intended call is sanctioned.

(4) *Form* 52.—The sanction of the Committee shall be given by resolution, which shall be passed by a majority of the members present.

(5) Where there is no Committee of Inspection, the Liquidator shall not make a call without obtaining the leave of the Court.

84. *Application to the Court for leave to make a call. Forms* 54 *to* 57.—In a winding-up by the Court an application to the Court for leave to make any call on the contributories of a Company, or any of them, for any purpose authorised by the Acts, shall be made by summons stating the proposed amount of such call, which summons shall be served four clear days at the least before the day appointed for making the call on every contributory proposed to be included in such call; or if the Court so directs, notice of such intended call may be given by advertisement, without a separate notice to each contributory.

85. *Document making the call. Form* 58.—When the Liquidator is authorised by resolution or order to make a call on the contributories he shall file with the Registrar a document in the Form 58 with such variations as circumstances may require making the call.

86. *Service of notice of a call. Forms* 52, 53, *and* 59.—When a call

has been made by the Liquidator in a winding-up by the Court, a copy of the resolution of the Committee of Inspection or order of the Court (if any), as the case may be, shall forthwith after the call has been made be served upon each of the contributories included in such call, together with a notice from the Liquidator specifying the amount or balance due from such contributory in respect of such call, but such resolution or order need not be advertised unless for any special reason the Court so directs.

87. *Enforcement of call. Forms* 60, 61, *and* 62.—The payment of the amount due from each contributory on a call may be enforced by order of the Court, to be made in Chambers on summons by the Liquidator.

PROOFS.

88. *Proof of debt.*—In a winding-up by the Court every creditor shall prove his debt, unless the Judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof.

89. *Mode of proof.*—A debt may be proved in any winding-up by delivering or sending through the post an affidavit verifying the debt. In a winding-up by the Court the affidavit shall be so sent to the Official Receiver or, if a Liquidator has been appointed, to the Liquidator; and in any other winding-up the affidavit may be so sent to the Liquidator.

90. *Verification of proof.*—An affidavit proving a debt may be made by the creditor himself or by some person authorised by or on behalf of the creditor. If made by a person so authorised, it shall state his authority and means of knowledge.

91. *Contents of proof. Form* 63.—An affidavit proving a debt shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The Official Receiver or Liquidator to whom the proof is sent may at any time call for the production of the vouchers.

92. *Statement of security.*—An affidavit proving a debt shall state whether the creditor is or is not a secured creditor.

93. *Proof before whom sworn.*—An affidavit proving a debt may in a winding-up by the Court be sworn before an Official Receiver, or Assistant Official Receiver, or any officer of the Board of Trade or any clerk of an Official Receiver duly authorised in writing by the Court or the Board of Trade in that behalf.

94. *Costs of proof.*—A creditor shall bear the cost of proving his debt unless the Court otherwise orders.

95. *Discount.*—A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any

discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.

96. *Periodical Payments.*—When any rent or other payment falls due at stated periods, and the order or resolution to wind-up is made at any time other than one of those periods, the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding-up order or resolution as if the rent or payment grew due from day to day. Provided that where the Liquidator remains in occupation of premises demised to a Company which is being wound up, nothing herein contained shall prejudice or affect the right of the landlord of such premises to claim payment by the Company, or the Liquidator, of rent during the period of the Company's or the Liquidator's occupation.

97. *Interest.*—On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding-up order or resolution, the creditor may prove for interest at a rate not exceeding four per centum per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment.

98. *Proof for debt payable at a future time.*—A creditor may prove for a debt not payable at the date of the winding-up order or resolution, as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

99. *Workmen's wages. Form* 64.—In any case in which it appears that there are numerous claims for wages by workmen and others employed by the Company, it shall be sufficient if one proof for all such claims is made either by a foreman or by some other person on behalf of all such creditors. Such proof shall have annexed thereto as forming part thereof, a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any proof made in compliance with this Rule shall have the same effect as if separate proofs had been made by each of the said workmen and others.

100. *Production of bills of exchange and promissory notes.*—Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the Company is liable, such bill of exchange, note, instrument,

or security must, subject to any special order of the Court made to the contrary, be produced to the Official Receiver, Chairman of a meeting or Liquidator, as the case may be, and be marked by him before the proof can be admitted either for voting or for any purpose.

101. *Transmission of proofs to Liquidator.*—Where a Liquidator is appointed in a winding-up by the Court, all proofs of debts that have been received by the Official Receiver shall be handed over to the Liquidator, but the Official Receiver shall first make a list of such proofs, and take a receipt thereon from the Liquidator for such proofs.

ADMISSION AND REJECTION OF PROOFS, AND APPEAL TO THE COURT.

102. *Notice to creditors to prove.*—Subject to the provisions of the Act, and unless otherwise ordered by the Court, the Liquidator in any winding-up may from time to time fix a certain day, which shall be not less than fourteen days from the date of the notice, on or before which the creditors of the Company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved, and the Liquidator shall give notice in writing of the day so fixed by advertisement in such newspaper as he shall consider convenient, and in a winding-up by the Court to every person mentioned in the Statement of Affairs as a creditor, and who has not proved his debt, and in any other winding-up to the last known address or place of abode of each person who, to the knowledge of the Liquidator, claims to be a creditor of the Company and whose claim has not been admitted.

103. *Examination of proof. Form* 65.—The Liquidator shall examine every proof of debt lodged with him, and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

104. *Appeal by creditor.*—If a creditor or contributory is dissatisfied with the decision of the Liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but, subject to the power of the Court to extend the time, no application to reverse or vary the decision of the Liquidator in a winding-up by the Court rejecting a proof sent to him by a creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of the service of the notice of rejection.

105. *Expunging at instance of Liquidator.*—If the Liquidator thinks that a proof has been improperly admitted, the Court may,

on the application of the Liquidator, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

106. *Expunging at instance of creditor.*—The Court may also expunge or reduce a proof upon the application of a creditor or contributory if the Liquidator declines to interfere in the matter.

107. *Oaths.*—For the purpose of any of his duties in relation to proofs, the Liquidator, in a winding-up by the Court, may administer oaths and take affidavits.

108. *Official Receiver's powers.*—In a winding-up by the Court the Official Receiver, before the appointment of a Liquidator, shall have all the powers of a Liquidator with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal.

109. *Filing proofs by Official Receiver.*—In a winding-up by the Court the Official Receiver, where no other Liquidator is appointed, shall, before payment of a dividend, file all proofs tendered in the winding-up, with a list thereof, distinguishing in such list the proofs which were wholly or partly admitted, and the proofs which were wholly or partly rejected.

110. *Proofs to be filed. Form* 66.—Every Liquidator in a winding-up by the Court other than the Official Receiver shall on the first day of every month, file with the Registrar a certified list of all proofs, if any, received by him during the month next preceding, distinguishing in such lists the proofs admitted, those rejected, and such as stand over for further consideration; and, in the case of proofs admitted or rejected, he shall cause the proofs to be filed with the Registrar.

111. *Procedure where creditor appeals.*—The Liquidator in a winding-up by the Court, including the Official Receiver when he is Liquidator, shall, within three days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file such proof with the Registrar, with a memorandum thereon of his disallowance thereof.

112. *Time for dealing with proofs by Official Receiver.*—Subject to the power of the Court to extend the time in a winding-up by the Court, the Official Receiver as Liquidator, not later than fourteen days from the latest date specified in the notice of his intention to declare a dividend as the time within which such proofs must be lodged, shall in writing either admit or reject wholly, or in part every proof lodged with him, or require further evidence in support of it.

113. *Time for dealing with proofs by Liquidator.*—Subject to the power of the Court to extend the time, the Liquidator in a winding-up by the Court, other than the Official Receiver, within twenty-eight

days after receiving a proof, which has not previously been dealt with, shall in writing either admit or reject it wholly or in part, or require further evidence in support of it. Provided that where the Liquidator has given notice of his intention to declare a dividend, he shall within fourteen days after the date mentioned in the notice as the latest date up to which proofs must be lodged, examine, and in writing admit or reject, or require further evidence in support of, every proof which has not been already dealt with, and shall give notice of his decision, rejecting a proof wholly or in part, to the creditors affected thereby. Where a creditor's proof has been admitted the notice of dividend shall be a sufficient notification of the admission.

114. *Cost of appeals from decisions as to proofs.*—The Official Receiver shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part.

GENERAL MEETINGS OF CREDITORS AND CONTRIBUTORIES IN RELATION TO A WINDING-UP BY THE COURT.

115. *First meetings of creditors and contributories.*—The meetings of creditors and contributories under section 152 of the Act (hereinafter referred to as the first meetings of creditors and contributories) shall be held within twenty-one days, or if a Special Manager has been appointed then within one month after the date of the Winding-up Order or within such further time as the Court may approve. The dates of such meetings shall be fixed and they shall be summoned by the Official Receiver.

116. *Notice of first meetings to Board of Trade.*—The Official Receiver shall forthwith give notice of the days fixed by him for the first meetings of creditors and contributories to the Board of Trade, who shall gazette the same.

117. *Summoning of first meetings.*—The first meetings of creditors and contributories shall be summoned as hereinafter provided.

118. *Form of notices of first meetings. Forms* 21 *and* 22.—The notices of first meetings of creditors and contributories may be in Forms 21 and 22 appended hereto, and the notices to creditors shall state a time within which the creditors must lodge their proofs in order to entitle them to vote at the first meeting.

119. *Notice of first meetings to officers of company. Form* 23.—The Official Receiver shall also give to each of the Directors and other Officers of the Company who in his opinion ought to attend the first meetings of creditors and contributories seven days' notice of the time and place appointed for each meeting. The notice may either be delivered personally or sent by prepaid post letter, as may be convenient. It shall be the duty of every Director or Officer

who receives notice of such meeting to attend if so required by the Official Receiver.

120. *Summary of statement of affairs.*—The Official Receiver shall also, as soon as practicable, send to each creditor mentioned in the Company's Statement of Affairs, and to each person appearing from the Company's books or otherwise to be a contributory of the Company a summary of the Company's Statement of Affairs, including the causes of its failure, and any observations thereon which the Official Receiver may think fit to make. The proceedings at a meeting shall not be invalidated by reason of any summary or notice required by these Rules not having been sent or received before the meeting.

121. *Liquidator's meetings of creditors and contributories.*—In addition to the first meetings of creditors and contributories and in addition also to meetings of creditors and contributories directed to be held by the Court under Section 219 of the Act (hereinafter referred to as Court meetings of creditors and contributories), the Liquidator may himself from time to time subject to the provisions of the Act and the control of the Court summon, hold and conduct meetings of the creditors or contributories (hereinafter referred to as Liquidator's meetings of creditors and contributories) for the purpose of ascertaining their wishes in all matters relating to the winding-up.

122. *Application of rules as to meetings.*—Except where and so far as the nature of the subject-matter or the context may otherwise require the succeeding Rules as to meetings hereinafter set out are intended to apply to first meetings, Court meetings and Liquidator's meetings of creditors and contributories, but so nevertheless that the said Rules shall take effect as to first meetings subject and without prejudice to any express provisions of the Act and as to Court meetings subject and without prejudice to any express directions of the Court.

123. *Summoning of meetings.*—The Official Receiver or Liquidator shall summon all meetings of creditors and contributories by giving not less than seven days' notice of the time and place thereof in the London *Gazette* and in a local paper; and shall not less than seven days before the day appointed for the meeting send by post to every person appearing by the Company's books to be a creditor of the Company notice of the meeting of creditors, and to every person appearing by the Company's books or otherwise to be a contributory of the Company notice of the meeting of contributories.

The notice to each creditor shall be sent to the address given in his proof, or if he has not proved to the address given in the Statement of Affairs of the Company, or to such other address as may be known to the person summoning the meeting. The notice to

each contributory shall be sent to the address mentioned in the Company's books as the address of such contributory, or to such other address as may be known to the person summoning the meeting.

124. *Proof of notice. Forms* 76 *and* 77.—A certificate by the Official Receiver or other officer of the Court, or by the Clerk of any such person, or an affidavit by the Liquidator, or his solicitor, or the Clerk of either of such persons, that the notice of any meeting has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.

125. *Place of meetings.*—The meetings shall be held at such place as is in the opinion of the Official Receiver or Liquidator most convenient for the majority of the creditors or contributories or both. Different times or places or both may if thought expedient be named for the meetings of creditors and for the meetings of contributories.

126. *Costs of calling meeting.*—The costs of summoning a meeting of creditors or contributories at the instance of any person other than the Official Receiver or Liquidator shall be paid by the person at whose instance it is summoned, who shall before the meeting is summoned deposit with the Official Receiver or Liquidator (as the case may be) such sum as may be required by the Official Receiver or Liquidator as security for the payment of such costs. The costs of summoning such meeting of creditors or contributories, including all disbursements for printing, stationery, postage and the hire of room, shall be calculated at the following rate for each creditor or contributory to whom notice is required to be sent, namely, two shillings per creditor or contributory for the first 20 creditors or contributories, one shilling per creditor or contributory for the next 30 creditors or contributories, sixpence per creditor or contributory for any number of creditors or contributories after the first 50. The said costs shall be repaid out of the assets of the Company if the Court shall by Order or if the creditors or contributories (as the case may be) shall by resolution so direct.

127. *Chairman of meeting. Form* 79.—Where a meeting is summoned by the Official Receiver or the Liquidator, he or someone nominated by him shall be Chairman of the meeting. At every other meeting of creditors and contributories the Chairman shall be such person as the meeting by resolution shall appoint.

128. *Ordinary resolution of creditors and contributories.*—At a meeting of creditors a resolution shall be deemed to be passed when a majority in number and value of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution, and at a meeting of the contributories a resolution shall

be deemed to be passed when a majority in number and value of the contributories present personally or by proxy, and voting on the resolution, have voted in favour of the resolution, the value of the contributories being determined according to the number of votes conferred on each contributory by the regulations of the Company.

129. *Copy of resolution to be filed.*—The Official Receiver or as the case may be the Liquidator shall file with the Registrar a copy certified by him of every resolution of a meeting of creditors or contributories.

130. *Non-reception of notice by a creditor.*—Where a meeting of creditors or contributories is summoned by notice the proceedings and resolutions at the meeting shall unless the Court otherwise orders be valid notwithstanding that some creditors or contributories may not have received the notice sent to them.

131. *Adjournment. Form* 78.—The Chairman may with the consent of the meeting adjourn it from time to time and from place to place, but the adjourned meeting shall be held at the same place as the original place of meeting unless in the resolution for adjournment another place is specified or unless the Court otherwise orders.

132. *Quorum.*—(1) A meeting may not act for any purpose except the election of a chairman, the proving of debts and the adjournment of the meeting unless there are present or represented thereat at least three creditors entitled to vote or three contributories or all the creditors entitled to vote or all the contributories if the number of the creditors entitled to vote or the contributories as the case may be shall not exceed three.

(2) If within half an hour from the time appointed for the meeting a quorum of creditors or contributories is not present or represented the meeting shall be adjourned to the same day in the following week at the same time and place or to such other day as the chairman may appoint not being less than seven or more than twenty-one days.

133. *Creditors entitled to vote.*—In the case of a first meeting of creditors or of an adjournment thereof a person shall not be entitled to vote as a creditor unless he has duly lodged with the Official Receiver not later than the time mentioned for that purpose in the notice convening the meeting or adjourned meeting a proof of the debt which he claims to be due to him from the Company. In the case of a Court meeting or Liquidator's meeting of creditors a person shall not be entitled to vote as a creditor unless he has duly lodged with the Official Receiver or Liquidator a proof of the debt which he claims to be due to him from the Company and such proof has been admitted wholly or in part before the date on which the meeting is held. Provided that this and the next four following

rules shall not apply to a Court meeting of creditors held prior to the first meeting of creditors.

134. *Cases in which creditors may not vote.*—A creditor shall not vote in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained, nor shall a creditor vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the Company, and against whom a Receiving Order in Bankruptcy has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

135. *Votes of secured creditors.*—For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

136. *Creditor required to give up security.*—The Official Receiver or Liquidator may within twenty-eight days after a proof estimating the value of a security as aforesaid has been used in voting at a meeting require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated with an addition thereto of twenty per cent. Provided that where a creditor has valued his security he may at any time before being required to give up correct the valuation by a new proof and deduct the new value from his debt, but in that case the said addition of twenty per cent. shall not be made if the security is required to be given up.

137. *Admission and rejection of proofs for purpose of voting.*—The Chairman shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

138. *Minutes of meeting.*—The Chairman shall cause Minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose and the Minutes shall be signed by him or by the chairman of the next ensuing meeting.

PROXIES IN RELATION TO A WINDING-UP BY THE COURT.

139. *Proxies.*—A creditor or a contributory may vote either in person or by proxy. The succeeding rules as to proxies shall not (unless otherwise directed by the Court) apply to a Court meeting of creditors or contributories prior to the first meeting.

140. *Form of proxies. Forms* 80 *and* 81.—Every instrument of proxy shall be in accordance with the form in the Appendix and every written part thereof shall be in the handwriting of the person giving the proxy or of any manager or clerk or other person in his regular employment or of a Commissioner to administer oaths in the Supreme Court.

141. *Forms of proxy to be sent with notices.*—General and special forms of proxy shall be sent to the creditors and contributories with the notice summoning the meeting, and neither the name nor description of the Official Receiver or Liquidator or any other person shall be printed or inserted in the body of any instrument of proxy before it is so sent.

142. *General proxies to managers or clerks.*—A creditor or a contributory may give a general proxy to his manager or clerk or any other person in his regular employment. In any such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor or contributory.

143. *Special proxies.*—A creditor or a contributory may give a special proxy to any person to vote at any specified meeting or adjournment thereof:—

(*a*) for or against the appointment or continuance in office of any specified person as Liquidator or Member of the Committee of Inspection, and;

(*b*) on all questions relating to any matter other than those above referred to and arising at the meeting or an adjournment thereof.

144. *Solicitation by Liquidator to obtain proxies.*—Where it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a Liquidator in obtaining proxies or in procuring his appointment as Liquidator except by the direction of a meeting of creditors or contributories, the Court if it thinks fit may order that no remuneration be allowed to the person by whom or on whose behalf the solicitation was exercised notwithstanding any resolution of the Committee of Inspection or of the creditors or contributories to the contrary.

145. *Proxies to Official Receiver or Liquidator.*—A creditor or a contributory may appoint the Official Receiver or Liquidator to act as his general or special proxy.

146. *Holder of proxy not to vote on matter in which he is financially*

interested.—No person acting either under a general or a special proxy shall vote in favour of any resolution which would directly or indirectly place himself, his partner or employer in a position to receive any remuneration out of the estate of the Company otherwise than as creditor rateably with the other creditors of the Company. Provided that where any person holds special proxies to vote for an application to the Court in favour of the appointment of himself as Liquidator he may use the said proxies and vote accordingly.

147. *Proxies. Forms* 80 *and* 81.—(1) A proxy intending to be used at the first meeting of creditors or contributories, or an adjournment thereof, shall be lodged with the Official Receiver not later than the time mentioned for that purpose in the notice convening the meeting or the adjourned meeting, which time shall be not earlier than twelve o'clock at noon of the day but one before, nor later than twelve o'clock at noon of the day before the day appointed for such meeting, unless the Court otherwise directs.

(2) In every other case a proxy shall be lodged with the Official Receiver or Liquidator not later than four o'clock in the afternoon of the day before the meeting or adjourned meeting at which it is to be used.

(3) No person shall be appointed a general or special proxy who is a minor.

(4) Where a limited Company is a creditor, any person who is duly authorised under the seal of the creditor Company to act generally on behalf of the creditor Company at meetings of creditors and contributories and to appoint himself or any other person to be the creditor Company's proxy, may fill in and sign the form of proxy on the creditor Company's behalf and appoint himself to be the creditor Company's proxy, and a proxy so filled in and signed by such a person shall be received and dealt with as the proxy of the creditor Company.

148. *Use of proxies by deputy.*—Where an Official Receiver who holds any proxies cannot attend the meeting for which they are given, he may, in writing, depute some person under his official control to use the proxies on his behalf, and in such manner as he may direct.

149. *Filling in where creditor blind or incapable.*—The proxy of a creditor blind or incapable of writing may be accepted, if such creditor has attached his signature or mark thereto in the presence of a witness, who shall add to his signature his description and residence; provided that all insertions in the proxy are in the handwriting of the witness, and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark (*a*).

(*a*) See new rule 149A, *post*, p. 368.

DIVIDENDS IN A WINDING-UP BY THE COURT.

150. *Dividends to creditors. Form* 67.—(1) Not more than two months before declaring a dividend the Liquidator in a winding-up by the Court, shall give notice of his intention to do so to the Board of Trade in order that the same may be gazetted, and at the same time to such of the creditors mentioned in the statement of affairs as have not proved their debts. Such notice shall specify the latest date up to which proofs must be lodged, which shall not be less than fourteen days from the date of such notice.

(2) Where any creditor, after the date mentioned in the notice of intention to declare a dividend as the latest date up to which proofs may be lodged, appeals against the decision of the Liquidator rejecting a proof, notice of appeal shall, subject to the power of the Court to extend the time in special cases, be given within seven days from the date of the notice of the decision against which the appeal is made, and the Liquidator may in such cases make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted. Where no notice of appeal has been given within the time specified in this Rule, the Liquidator shall exclude all proofs which have been rejected from participation in the dividend.

(3) *Form* 71.—Immediately after the expiration of the time fixed by this Rule for appealing against the decision of the Liquidator he shall proceed to declare a dividend, and shall give notice to the Board of Trade (in order that the same may be gazetted), and shall also send a notice of dividend to each creditor whose proof has been admitted.

(4) If it becomes necessary, in the opinion of the Liquidator and the Committee of Inspection, to postpone the declaration of the dividend beyond the limit of two months, the Liquidator shall give a fresh notice of his intention to declare a dividend to the Board of Trade in order that the same may be gazetted; but it shall not be necessary for the Liquidator to give a fresh notice to such of the creditors mentioned in the statement of affairs as have not proved their debts. In all other respects the same procedure shall follow the fresh notice as would have followed the original notice.

(5) *Forms* 68 *and* 69.—Upon the declaration of a dividend the Liquidator shall forthwith transmit to the Board of Trade a list of the proofs filed with the Registrar under Rule 110, which list shall be in the Form 68 or 69 in the Appendix as the case may be. If the winding-up is in a Court other than the High Court the list shall, on payment of the prescribed fee, be examined by the Registrar with the proofs tendered for filing and if found correct shall be certified by the Registrar. If the winding-up is in the High Court

the Liquidator shall, if so required by the Board of Trade, transmit to the Board of Trade, office copies of all lists of proofs filed by him up to the date of the declaration of the dividend.

(6) Dividends may at the request and risk of the person to whom they are payable be transmitted to him by post.

(7) *Form* 72.—If a person to whom dividends are payable desires that they shall be paid to some other person he may lodge with the Liquidator a document in the Form 72 which shall be a sufficient authority for payment of the dividend to the person therein named.

151. *Return of capital to contributories. Forms* 73 *and* 74.—Every order by which the Liquidator in a winding-up by the Court is authorised to make a return to contributories of the Company, shall, unless the Court shall otherwise direct, contain or have appended thereto a Schedule or List (which the Liquidator shall prepare) setting out in a tabular form the full names and addresses of the persons to whom the return is to be paid, and the amount of money payable to each person, and particulars of the transfers of shares (if any) which have been made or the variations in the list of contributories which have arisen since the date of the settlement of the list of contributories. The Schedule or List shall be in the Form 74 with such variations as circumstances shall require.

ATTENDANCE AND APPEARANCE OF PARTIES.

152. *Attendance at proceedings.*—(1) Every person for the time being on the list of contributories of the Company, and every person whose proof has been admitted shall be at liberty, at his own expense, to attend proceedings, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the Court shall be of opinion that the attendance of any such person upon any proceedings has occasioned any additional costs which ought not to be borne by the funds of the Company, it may direct such costs, or a gross sum in lieu thereof, to be paid by such person; and such person shall not be entitled to attend any further proceedings until he has paid the same.

(2) The Court may from time to time appoint any one or more of the creditors or contributories to represent before the Court, at the expense of the Company, all or any class of the creditors or contributories, upon any question or in relation to any proceedings before the Court, and may remove the person so appointed. If more than one person is appointed under this Rule to represent one class, the persons appointed shall employ the same solicitor to represent them.

(3) No creditor or contributory shall be entitled to attend any

proceedings in Chambers unless and until he has entered in a book, to be kept by the Registrar for that purpose, his name and address, and the name and address of his solicitor (if any) and upon any change of his address or of his solicitor, his new address, and the name and address of his new solicitor.

153. *Attendance of Liquidator's Solicitor.*—Where the attendance of the Liquidator's solicitor is required on any proceeding in Court or Chambers, the Liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the Court directs him to attend.

LIQUIDATOR AND COMMITTEE OF INSPECTION IN A WINDING-UP BY THE COURT.

154. *Remuneration of Liquidator.*—(1) The remuneration of a Liquidator, unless the Court shall otherwise order, shall be fixed by the Committee of Inspection, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realised, after deducting the sums (if any) paid to secured creditors (other than debenture holders) out of the proceedings of their securities, and the other part on the amount distributed in dividend.

(2) If the Board of Trade is of opinion that the remuneration of a Liquidator as fixed by the Committee of Inspection is unnecessarily large, the Board of Trade may apply to the Court, and thereupon the Court shall fix the amount of the remuneration of the Liquidator.

(3) If there is no Committee of Inspection the remuneration of the Liquidator shall, unless the Court shall otherwise order, be fixed by the scale of fees and percentages for the time being payable on realisations and distributions by the Official Receiver as Liquidator.

155. *Limit of remuneration.*—Except as provided by the Act or the Rules, a Liquidator shall not under any circumstances whatever, make any arrangement for, or accept from any solicitor, auctioneer, or any other person connected with the Company of which he is Liquidator, or who is employed in or in connection with the winding-up of the Company, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration to which under the Act and the Rules he is entitled as Liquidator, nor shall he make any arrangement for giving up, or give up any part of such remuneration to any such solicitor, auctioneer, or other person.

156. *Dealing with assets.*—Neither the Liquidator nor any member of the Committee of Inspection of a Company shall, while acting as Liquidator or member of such Committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk,

agent, or servant, become purchaser of any part of the Company's assets. Any such purchase made contrary to the provisions of this Rule may be set aside by the Court on the application of the Board of Trade or any creditor or contributory, and the Court may make such order as to costs as the Court shall think fit.

157. *Restriction on purchase of goods by Liquidator.*—Where the Liquidator carries on the business of the Company, he shall not, without the express sanction of the Court, purchase goods for the carrying on of such business from any person whose connection with the Liquidator is of such a nature as would result in the Liquidator obtaining any portion of the profit (if any) arising out of the transaction.

158. *Committee of Inspection not to make profit.*—No member of a Committee of Inspection shall, except under and with the sanction of the Court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the winding-up, or to receive out of the assets any payment for services rendered by him in connection with the administration of the assets, or for any goods supplied by him to the Liquidator for or on account of the Company. If it appears to the Board of Trade that any profit or payment has been made contrary to the provisions of this Rule, they may disallow such payment or recover such profit, as the case may be, on the audit of the Liquidator's accounts.

159. *Costs of obtaining sanction of Court.*—In any case in which the sanction of the Court is obtained under the two last preceding Rules, the cost of obtaining such sanction shall be borne by the person in whose interest such sanction is obtained, and shall not be payable out of the Company's assets.

160. *Sanction of payments to Committee.*—Where the sanction of the Court to a payment to a member of a Committee of Inspection for services rendered by him in connection with the administration of the Company's assets is obtained, the order of the Court shall specify the nature of the services, and such sanction shall only be given where the service performed is of a special nature. Except by the express sanction of the Court no remuneration shall, under any circumstances, be paid to a member of a Committee for services rendered by him in the discharge of the duties attaching to his office as a member of such Committee.

161. *Discharge of costs before assets handed to Liquidator.*—(1) Where a Liquidator is appointed by the Court, and has notified his appointment to the Registrar of Joint Stock Companies, and given security to the Board of Trade, the Official Receiver shall forthwith put the Liquidator into possession of all property of the Company of which the Official Receiver may have custody; pro-

vided that such Liquidator shall have, before the assets are handed over to him by the Official Receiver, discharged any balance due to the Official Receiver on account of fees, costs, and charges properly incurred by him, and on account of any advances properly made by him in respect of the Company, together with interest on such advances at the rate of four pounds per centum per annum ; and the Liquidator shall pay all fees, costs, and charges of the Official Receiver which may not have been discharged by the Liquidator before being put into possession of the property of the Company, and whether incurred before or after he has been put into such possession.

(2) The Official Receiver shall be deemed to have a lien upon the Company's assets until such balance shall have been paid and the other liabilities shall have been discharged.

(3) It shall be the duty of the Official Receiver, if so requested by the Liquidator, to communicate to the Liquidator all such information respecting the estate and affairs of the Company as may be necessary or conducive to the due discharge of the duties of the Liquidator.

162. *Resignation of Liquidator.*—A Liquidator who desires to resign his office shall summon separate meetings of the creditors and contributories of the Company to decide whether or not the resignation shall be accepted. If the creditors and contributories by ordinary resolutions both agree to accept the resignation of the Liquidator, he shall file with the Registrar a memorandum of his resignation, and shall send notice thereof to the Official Receiver, and the resignation shall thereupon take effect. In any other case the Liquidator shall report to the Court the result of the meetings and shall send a report to the Official Receiver and thereupon the Court may, upon the application of the Liquidator or the Official Receiver, determine whether or not the resignation of the Liquidator shall be accepted, and may give such directions and make such orders as in the opinion of the Court shall be necessary.

163. *Office of Liquidator vacated by his insolvency.*—If a Receiving Order in Bankruptcy is made against the Liquidator, he shall thereby vacate his office, and for the purposes of the application of the Act and Rules shall be deemed to have been removed.

PAYMENTS INTO AND OUT OF A BANK.

164. *Payments out of Bank of England.*—All payments out of the Companies Liquidation Account shall be made in such manner as the Board of Trade may from time to time direct.

165. *Special Bank account. Forms* 82 *and* 83.—(1) Where the Liquidator in a winding-up by the Court is authorised to have a

special bank account, he shall forthwith pay all moneys received by him into that account to the credit of the Liquidator of the Company. All payments out shall be made by cheque payable to order, and every cheque shall have marked or written on the face of it the name of the Company, and shall be signed by the Liquidator, and shall be countersigned by at least one member of the Committee of Inspection, and by such other person, if any, as the Committee of Inspection may appoint.

(2) Where application is made to the Board of Trade to authorise the Liquidator in a winding-up by the Court to make his payments into and out of a special bank account, the Board of Trade may grant such authorisation for such time and on such terms as they may think fit, and may at any time order the account to be closed if they are of opinion that the account is no longer required for the purposes mentioned in the application.

Books.

166. *Record Book.*—The Official Receiver, until a Liquidator is appointed by the Court, and thereafter the Liquidator, shall keep a book to be called the "Record Book" in which he shall record all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories, or of the Committee of Inspection, and all such matters as may be necessary to give a correct view of his administration of the Company's affairs, but he shall not be bound to insert in the "Record Book" any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors or contributories), nor need he exhibit such document to any person other than a member of the Committee of Inspection, or the Official Receiver, or the Board of Trade.

167. *Cash Book.*—(1) The Official Receiver, until a Liquidator is appointed by the Court, and thereafter the Liquidator, shall keep a book to be called the "Cash Book" (which shall be in such form as the Board of Trade may from time to time direct) in which he shall (subject to the provisions of the Rules as to trading accounts) enter from day to day the receipts and payments made by him.

(2) The Liquidator shall submit the Record Book and Cash Book, together with any other requisite books and vouchers, to the Committee of Inspection (if any) when required, and not less than once every three months.

Investment of Funds.

168. *Investment of assets in securities, and realisation of securities. Forms* 84 *and* 85.—(1) Where the Committee of Inspection are of

opinion that any part of the cash balance standing to the credit of the account of the Company should be invested, they shall sign a certificate and request, and the Liquidator shall transmit such certificate and request to the Board of Trade.

(2) Where the Committee of Inspection are of opinion that it is advisable to sell any of the securities in which the moneys of the Company's assets are invested they shall sign a certificate and request to that effect, and the Liquidator shall transmit such certificate and request to the Board of Trade.

(3) Where in a winding-up by the Court in which there is no Committee of Inspection, or in a Voluntary Winding-up or winding-up under the supervision of the Court, a case has in the opinion of the Liquidator arisen under section 231 of the Act for an investment of funds of the Company or a sale of securities in which the Company's funds have been invested, the Liquidator shall sign and transmit to the Board of Trade a certificate of the facts on which his opinion is founded, and a request to the Board of Trade to make the investment mentioned in the certificate, and the Board of Trade may thereupon, if it thinks fit, invest or sell the whole or any part of the said funds or securities, as provided in the said section, and the said certificate and request shall be a sufficient authority to the Board of Trade for the said investment or sale.

ACCOUNTS AND AUDIT IN A WINDING-UP BY THE COURT.

169. *Audit of Cash Book. Form* 86.—The Committee of Inspection shall not less than once every three months audit the Liquidator's Cash Book and certify therein under their hands the day on which the said book was audited.

170. *Board of Trade audit of Liquidator's accounts.*—(1) The Liquidator shall, at the expiration of six months from the date of the winding-up order, and at the expiration of every succeeding six months thereafter until his release, transmit to the Board of Trade a copy of the Cash Book for such period in duplicate, together with the necessary vouchers and copies of the certificates of audit by the Committee of Inspection. He shall also forward with the first accounts a summary of the Company's statement of affairs, showing thereon in red ink the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised. The Liquidator shall also at the end of every six months forward to the Board of Trade, with his Accounts, a report upon the position of the liquidation of the Company in such form as the Board of Trade may direct.

(2) When the assets of the Company have been fully realised and distributed, the Liquidator shall forthwith send in his accounts

to the Board of Trade, although the six months may not have expired.

(3) *Form* 87.—The accounts sent in by the Liquidator shall be verified by him by affidavit.

171. *Liquidator carrying on business.*—(1) Where the Liquidator carries on the business of the Company, he shall keep a distinct account of the trading, and shall incorporate in the Cash Book the total weekly amount of the receipts and payments on such trading account.

(2) *Forms* 88 *and* 88A.—The trading account shall from time to time, and not less than once in every month, be verified by affidavit, and the Liquidator shall thereupon submit such account to the Committee of Inspection (if any), or such member thereof as may be appointed by the Committee for that purpose, who shall examine and certify the same.

172. *Copy of accounts to be filed.*—When the Liquidator's account has been audited, the Board of Trade shall certify the fact upon the account, and thereupon the duplicate copy, bearing a like certificate, shall be filed with the Registrar.

173. *Summary of accounts.*—(1) The Liquidator shall transmit to the Board of Trade with his accounts a summary of such accounts in such form as the Board of Trade may from time to time direct and, on the approval of such summary by the Board of Trade, shall forthwith obtain, prepare, and transmit to the Board of Trade so many printed copies thereof, duly stamped for transmission by post, and addressed to the creditors and contributories, as may be required for transmitting such summary to each creditor and contributory.

(2) The cost of printing and posting such copies shall be a charge upon the assets of the Company.

174. *Affidavit of no receipts.*—Where a Liquidator has not since the date of his appointment or since the last audit of his accounts, as the case may be, received or paid any sum of money on account of the assets of the Company, he shall, at the time when he is required to transmit his accounts to the Board of Trade, forward to the Board of Trade an affidavit of no receipts or payments.

175. *Proceedings on resignation, &c., of Liquidator.*—(1) Upon a Liquidator resigning, or being released or removed from his office, he shall deliver over to the Official Receiver, or as the case may be, to the new Liquidator, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of Liquidator. The release of a Liquidator shall not take effect unless and until he has delivered over to the Official Receiver, or as the case may be to the new Liquidator, all the books, papers, documents, and accounts which he is by this Rule required to deliver on his release.

(2) *Disposal of books.*—The Board of Trade may, at any time during the progress of the liquidation, on the application of the Liquidator or the Official Receiver, direct that such of the books, papers, and documents of the Company or of the Liquidator as are no longer required for the purpose of the liquidation, may be sold, destroyed, or otherwise disposed of.

176. *Expenses of sales.*—Where property forming part of a Company's assets is sold by the Liquidator through an auctioneer or other agent, the gross proceeds of the sale shall be paid over by such auctioneer or agent, and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent, on the production of the necessary certificate of the taxing officer. Every Liquidator by whom such auctioneer or agent is employed, shall, unless the Court otherwise orders, be accountable for the proceeds of every such sale.

TAXATION OF COSTS.

177. *Taxation of costs payable by or to Official Receiver or Liquidator, or by Company. Form* 89.—Every solicitor, manager, accountant, auctioneer, broker or other person employed by an Official Receiver or Liquidator in a winding-up by the Court shall on request by the Official Receiver or Liquidator (to be made a sufficient time before the declaration of a dividend) deliver his bill of costs or charges to the Official Receiver or Liquidator for the purpose of taxation; and if he fails to do so within the time stated in the request, or such extended time as the Court may allow, the Liquidator shall declare and distribute the dividend without regard to such person's claim, and subject to any order of the Court the claim shall be forfeited. The request by the Official Receiver or Liquidator shall be in the Form No. 89.

178. *Notice of appointment.*—Where a bill of costs or charges in any winding-up has been lodged with the Taxing Officer, he shall give notice of an appointment to tax the same, in a winding-up by the Court to the Official Receiver, and in every winding-up to the Liquidator, and to the person to or by whom the bill or charges is or are to be paid (as the case may be).

179. *Lodgment of Bill.*—The bill or charges, if incurred in a winding-up by the Court prior to the appointment of a Liquidator, shall be lodged with the Official Receiver, and if incurred after the appointment of a Liquidator, shall be lodged with the Liquidator. The Official Receiver or the Liquidator, as the case may be, shall lodge the bill or charges with the proper Taxing Officer.

180. *Copy of the Bill to be furnished.*—Every person whose bill or charges in a winding-up by the Court is or are to be taxed shall,

on application either of the Official Receiver or the Liquidator, furnish a copy of his bill or charges so to be taxed, on payment at the rate of 4d. per folio, which payment shall be charged on the assets of the Company. The Official Receiver shall call the attention of the Liquidator to any items which, in his opinion, ought to be disallowed or reduced, and may attend or be represented on the taxation.

181. *Applications for costs.*—Where any party to, or person affected by, any proceeding desires to make an application for an order that he be allowed his costs, or any part of them, incident to such proceeding, and such application is not made at the time of the proceeding:—

(1) Such party or person shall serve notice of his intended application on the Official Receiver in a winding-up by the Court and in every winding-up on the Liquidator.

(2) The Official Receiver (if any) and Liquidator may appear on such application and object thereto.

(3) No costs of or incident to such application shall be allowed to the applicant, unless the Court is satisfied that the application could not have been made at the time of the proceeding.

182. *Certificate of taxation. Form* 90.—Upon the taxation of any bill of costs, charges, or expenses being completed, the Taxing Officer shall issue to the person presenting such bill for taxation his allowance or certificate of taxation. The bill of costs, charges, and expenses, together with the allowance or certificate, shall be filed with the Registrar.

183. *Certificate of employment.*—Where the bill or charges of any solicitor, manager, accountant, auctioneer, broker, or other person employed by an Official Receiver or Liquidator, is or are payable out of the assets of the Company, a certificate in writing, signed by the Official Receiver or Liquidator, as the case may be, shall on the taxation be produced to the Taxing Officer setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment.

184. *Scale of costs in a County Court, and taxation.*—In a County Court all costs properly incurred in a winding-up by the Court shall be allowed on the Lower Scale in Appendix N. to the Rules of the Supreme Court, and costs shall be taxed by the Registrar in person (*a*).

185. *Review of taxation at instance of Board of Trade.*—(1) Where any bill of costs, charges, fees or disbursements which are payable out of the assets of the Company to any solicitor, manager, account-

(*a*) See rule 184B, *post*, p. 367.

ant, auctioneer, broker or other person has been taxed by a Registrar of a Court other than the High Court, the Board of Trade may require the taxation to be reviewed by the Taxing Officer of the High Court.

(2) In any case in which the Board of Trade require such a review of taxation as is above mentioned they shall give notice to the person whose bill has been taxed, and shall apply to the Taxing Officer of the High Court to appoint a time for the review of such taxation and thereupon such Taxing Officer shall appoint a time for the review of, and shall review, such taxation and certify the result thereof. The Board of Trade shall give to the person whose bill of costs is to be reviewed notice of the time appointed for the review.

(3) Where any such review of taxation as is above mentioned is required to be made by the Taxing Officer of the High Court, the Registrar whose taxation is to be reviewed shall forward to the said Taxing Officer the bill which is required to be reviewed.

(4) The Board of Trade may appear upon the review of the taxation; and if, upon the review of the taxation, the bill is allowed at a lower sum than the sum allowed on the original taxation, the amount disallowed shall (if the bill has been paid) be repaid to the Official Receiver or the Liquidator, or other person entitled thereto. The certificate of the Taxing Officer shall in every case of a review by him under this Rule be a sufficient authority to entitle the person to whom the amount disallowed ought to be repaid to demand such amount from the person liable to repay the same.

(5) The costs of and incidental to the review shall be paid out of the assets of the Company or otherwise as the Taxing Officer or the Court may direct; provided that the cost of the attendance of a principal shall not be allowed if in the opinion of the Taxing Officer he could have been sufficiently represented by his London agent.

COSTS AND EXPENSES PAYABLE OUT OF THE ASSETS OF THE COMPANY.

186. *Liquidator's charges.*—(1) Where a Liquidator or Special Manager in a winding-up by the Court receives remuneration for his services as such, no payment shall be allowed on his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or Rules to be performed by himself.

(2) Where a Liquidator is a solicitor he may contract that the remuneration for his services as Liquidator shall include all professional services.

187. *Costs payable out of the assets.*—(1) The assets of a Company in a winding-up by the Court, remaining after payment of the fees and actual expenses incurred in realising or getting in the assets, shall, subject to any order of the Court, and, as regards a winding-up to which the provisions of the Stannaries Act, 1887, (*a*) apply, subject to that Act as modified by the Act, be liable to the following payments, which shall be made in the following order of priority, namely :—

First.—The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court.

Next.—The remuneration of the special manager (if any).

Next.—The costs and expenses of any person who makes or concurs in making, the Company's statement of affairs.

Next.—The taxed charges of any shorthand writer appointed to take an examination. Provided that where the shorthand writer is appointed at the instance of the Official Receiver the cost of the shorthand notes shall be deemed to be an expense incurred by the Official Receiver in getting in and realising the assets of the Company.

Next.—The Liquidator's necessary disbursements, other than actual expenses of realisation heretofore provided for.

Next.—The costs of any person properly employed by the Liquidator.

Next.—The remuneration of the Liquidator.

Next.—The actual out-of-pocket expenses necessarily incurred by the Committee of Inspection, subject to the approval of the Board of Trade.

(2) *Costs.*—No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers, or other persons other than payments for costs and expenses incurred and sanctioned under Rule 54, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the Company without proof that the same have been considered and allowed by the Registrar. The Taxing Officer shall satisfy himself before passing such bills or charges that the employment of the solicitor or other person in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the Official Receiver when acting as Liquidator may without taxation pay and allow the costs and charges of any person other than a Solicitor employed by him where such costs and charges are within the scale usually allowed

(*a*) 50 & 51 Vict. c. 43.

by the Court and do not exceed the sum of £2 : provided always that the Board of Trade may require such costs or charges to be taxed by the Taxing Officer.

(3) Nothing contained in this Rule shall apply to or affect costs which, in the course of legal proceedings by or against a Company which is being wound up by the Court, are ordered by the Court in which such proceedings are pending or a Judge thereof to be paid by the Company or the Liquidator, or the rights of the person to whom such costs are payable.

STATEMENTS BY LIQUIDATOR TO THE REGISTRAR OF JOINT STOCK COMPANIES.

188. *Conclusion of winding-up.*—The winding-up of a Company shall, for the purposes of section 224 of the Act, be deemed to be concluded :—

(*a*) In the case of a Company wound up by order of the Court, at the date on which the order dissolving the Company has been reported by the Liquidator to the Registrar of Companies, or at the date of the order of the Board of Trade releasing the Liquidator pursuant to section 157 of the Act.

(*b*) In the case of a Company wound up voluntarily, or under the supervision of the Court, at the date of the dissolution of the Company, unless at such date any funds or assets of the Company remain unclaimed or undistributed in the hands or under the control of the Liquidator, or any person who has acted as Liquidator, in which case the winding-up shall not be deemed to be concluded until such funds or assets have either been distributed or paid into the Companies Liquidation Account at the Bank of England.

189. *Times for sending Liquidator's statements, and regulations applicable thereto.*—The statements with respect to the proceedings in and position of a liquidation of a Company, the winding-up of which is not concluded within a year after its commencement, shall be sent to the Registrar of Companies twice in every year as follows :—

(1) The first statement commencing at the date when a Liquidator was first appointed and brought down to the end of twelve months from the commencement of the winding-up, shall be sent within 30 days from the expiration of such twelve months, or within such extended period as the Board of Trade may sanction, and the subsequent statements shall be sent at intervals of half a year, each

statement being brought down to the end of the half year for which it is sent.

(2) *Form* 92.—Subject to the next succeeding Rule, Form No. 92, with such variations as circumstances may require, shall be used, and the directions specified in the Form shall (unless the Board of Trade otherwise direct) be observed in reference to every statement.

(3) *Form* 93.—Every statement shall be sent in duplicate, and shall be verified by an affidavit in the Form No. 93, with such variations as circumstances may require.

190. *Affidavit of no receipts or payments. Forms* 92 *and* 93.—Where a Liquidator has not during any period for which a statement has to be sent received or paid any money on account of the Company, he shall at the period when he is required to transmit his statement, send to the Registrar of Companies the prescribed statement in the Form No. 92, in duplicate, containing the particulars therein required with respect to the proceedings in and position of the Liquidation, and with such statement shall also send an affidavit of no receipts or payments in the Form No. 93.

UNCLAIMED FUNDS AND UNDISTRIBUTED ASSETS IN THE HANDS OF A LIQUIDATOR.

191. *Payment of undistributed and unclaimed money into Companies Liquidation Account.*—(1) All money in the hands or under the control of a Liquidator of a Company representing unclaimed dividends, which for six months from the date when the dividend became payable have remained in the hands or under the control of the Liquidator, shall forthwith, on the expiration of the six months, be paid into the Companies Liquidation Account.

(2) All other money in the hands or under the control of a Liquidator of a Company, representing unclaimed or undistributed assets, which under sub-section 4 of section 224 of the Act, the Liquidator is to pay into the Companies Liquidation Account, shall be ascertained as on the date to which the statement of receipts and payments sent in to the Registrar of Companies is brought down, and the amount to be paid to the Companies Liquidation Account shall be the minimum balance of such money which the Liquidator has had in his hands or under his control during the six months immediately preceding the date to which the statement is brought down, less such part (if any) thereof as the Board of Trade may authorise him to retain for the immediate purposes of the liquidation. Such amount shall be paid into the Companies Liquidation Account within fourteen days from the date to which the statement of account is brought down.

(3) Notwithstanding anything in this Rule, any moneys representing unclaimed or undistributed assets or dividends in the hands of the Liquidator at the date of the dissolution of the Company shall forthwith be paid by him into the Companies Liquidation Account.

(4) A Liquidator whose duty it is to pay into the Companies Liquidation Account at the Bank of England, money representing unclaimed or undistributed assets of the Company, shall apply in such manner as the Board of Trade shall direct to the Board of Trade for a paying-in order, which paying-in order shall be an authority to the Bank of England to receive the payment.

(5) Money at the credit of the account of the Official Liquidator of a Company with the Bank of England shall be deemed to be money under the control of such Official Liquidator, and when such money has remained unclaimed or undistributed for six months after the date of receipt it shall be transferred to the Companies Liquidation Account, and the Official Liquidator and Master of the Chancery Division of the High Court attached to the Judge in whose chambers the winding-up is proceeding shall draw and sign such cheques or orders as may be necessary for the transfer of the money. An application to the Board of Trade for payment out of moneys so transferred shall be signed by the official Liquidator and counter-signed by the said Master.

(6) Money invested or deposited at interest by a Liquidator shall be deemed to be money under his control, and when such money forms part of the minimum balance payable into the Companies Liquidation Account pursuant to clause (2) of this Rule, the Liquidator shall realise the investment or withdraw the deposit, and shall pay the proceeds into the Companies Liquidation Account, provided that where the money is invested in Government securities, such securities may, with the permission of the Board of Trade, be transferred to the control of the Board of Trade instead of being forthwith realised and the proceeds thereof paid into the Companies Liquidation Account. In the latter case, if and when the money represented by the securities is required wholly or in part for the purposes of the Liquidation, the Board of Trade may realise the securities wholly or in part and pay the proceeds of realisation into the Companies Liquidation Account and deal with the same in the same way as other monies paid into the said Account may be dealt with.

192. *Liquidator to furnish information to Board of Trade. Form* 97.—Every person who has acted as Liquidator of any Company, whether the liquidation has been concluded or not, shall furnish to the Board of Trade particulars of any money in his hands or under his control representing unclaimed or undistributed assets

of the Company and such other particulars as the Board of Trade may require for the purpose of ascertaining or getting in any money payable into the Companies Liquidation Account at the Bank of England. The Board of Trade may require such particulars to be verified by affidavit.

193. *Board of Trade may call for verified accounts. Forms 92 and 93.*—(1) The Board of Trade may at any time order any such person to submit to them an account verified by affidavit of the sums received and paid by him as Liquidator of the Company and may direct and enforce an audit of the account.

(2) For the purposes of section 224 of the Act, and the Rules, the Court shall have, and, at the instance of the Board of Trade, may exercise all the powers conferred by the Bankruptcy Act, 1883, (*b*) with respect to the discovery and realisation of the property of a debtor, and the provisions of Part I of that Act with respect thereto shall, with any necessary modification, apply to proceedings under section 224 of the Act.

194. *Application to the Court for enforcing an account, and getting in money.*—An application by the Board of Trade for the purpose of ascertaining and getting in money payable into the Bank of England pursuant to section 224 of the Act, shall be made by motion, and where the winding-up is by or under the supervision of the Court shall be made to and dealt with by the Judge, and in a voluntary winding-up shall be made to and dealt with by the Judge of the High Court.

195. *Application for payment out by person entitled.*—An application by a person claiming to be entitled to any money paid into the Bank of England in pursuance of section 224 of the Act, shall be made in such form and manner as the Board of Trade may from time to time direct, and shall, unless the Board of Trade otherwise directs, be accompanied by the certificate of the Liquidator that the person claiming is entitled and such further evidence as the Board of Trade may direct.

196. *Application by Liquidator for payment out.*—A Liquidator who requires to make payments out of money paid into the Bank of England in pursuance of section 224 of the Act, either by way of distribution or in respect of the cost and expenses of the proceedings, shall apply in such form and manner as the Board of Trade may direct, and the Board of Trade may thereupon either make an order for payment to the Liquidator of the sum required by him for the purposes aforesaid, or may direct cheques to be issued to the Liquidator for transmission to the persons to whom the payments are to be made.

(*b*) 46 & 47 Vict. c. 52.

RELEASE OF LIQUIDATOR IN A WINDING-UP BY THE COURT.

197. *Proceedings for release of Liquidator. Forms* 98, 99, *and* 100.—(1) A Liquidator in a winding-up by the Court before making application to the Board of Trade for his release, shall give notice of his intention so to do to all the creditors who have proved their debts, and to all the contributories, and shall send with the notice a summary of his receipts and payments as Liquidator.

(2) When the Board of Trade have granted to a Liquidator his release, a notice of the order granting the release shall be gazetted. The Liquidator shall provide the requisite stamp fee for the *Gazette*, which he may charge against the Company's assets.

OFFICIAL RECEIVERS AND BOARD OF TRADE.

198. *Appointment.*—(1) Judicial notice shall be taken of the appointment of the Official Receivers appointed by the Board of Trade.

(2) When the Board of Trade appoints any officer to act as deputy for or in the place of an Official Receiver, notice thereof shall be given by letter to the Court to which such Official Receiver is or was attached. The letter shall specify the duration of such acting appointment.

(3) Any person so appointed shall, during his tenure of office, have all the status, rights, and powers, and be subject to all the liabilities of an Official Receiver.

199. *Removal.*—Where an Official Receiver is removed from his office by the Board of Trade, notice of the order removing him shall be communicated by letter to the Court to which the Official Receiver was attached.

200. *Personal performance of duties.*—The Board of Trade may by general or special directions determine what acts or duties of the Official Receiver in relation to the winding-up of Companies are to be performed by him in person, and in what cases he may discharge his functions through the agency of his clerks or other persons in his regular employ, or under his official control.

201. *Assistant Official Receivers.*—An assistant Official Receiver, appointed by the Board of Trade, shall be an officer of the Court, like the Official Receiver to whom he is assistant, and subject to the directions of the Board of Trade, he may represent the Official Receiver in all proceedings in Court, or in any administrative or other matter. Judicial notice shall be taken of the appointment of an assistant Official Receiver, and he may be removed in the same manner as is provided in the case of an Official Receiver.

202. *Power of Officers of Board of Trade and Official Receivers' clerks in certain cases to act for Official Receivers.*—In the absence of the Official Receiver any Officer of the Board of Trade duly authorised for the purpose by the Board of Trade, and any clerk of the Official Receiver duly authorised by him in writing, may by leave of the Court act on behalf of the Official Receiver, and take part for him in any public or other examination and in any unopposed application to the Court.

203. *Duties where no assets.*—Where a Company against which a winding-up order has been made has no available assets, the Official Receiver shall not be required to incur any expense in relation to the winding-up without the express directions of the Board of Trade.

204. *Accounting by Official Receiver.*—(1) Where a Liquidator is appointed by the Court in a winding-up by the Court, the Official Receiver shall account to the Liquidator.

(2) If the Liquidator is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, who shall take such action (if any) thereon as it may deem expedient.

(3) The provisions of these Rules as to Liquidators and their accounts shall not apply to the Official Receiver when he is Liquidator, but he shall account in such manner as the Board of Trade may from time to time direct.

205. *Official Receiver to act for Board of Trade where no committee of inspection.*—Where there is no Committee of Inspection any functions of the Committee of Inspection which devolve on the Board of Trade may, subject to the directions of the Board, be exercised by the Official Receiver.

206. *Appeals from Board of Trade and Official Receiver.*—An Appeal in the High Court against a decision of the Board of Trade, or an Appeal to the Court from an act or decision of the Official Receiver acting otherwise than as Liquidator of a Company, shall be brought within twenty-one days from the time when the decision or act appealed against is done, pronounced, or made.

207. *Applications under s.* 159 (2) *of the Act.*—(1) An application by the Board of Trade to the Court to examine on oath the Liquidator or any other person pursuant to section 159 of the Act, shall be made *ex parte*, and shall be supported by a report to the Court filed with the Registrar, stating the circumstances in which the application is made.

(2) The report may be signed by any person duly authorised to sign documents on behalf of the Board of Trade; and shall for the purposes of such application be *primâ facie* evidence of the statements therein contained.

BOOKS TO BE KEPT, AND RETURNS MADE, BY OFFICERS OF COURTS.

208. *Books to be kept by Officers of Courts. Forms* 101 *and* 102.—(1) In the High Court the Registrar and in the District Registries of the High Court at Liverpool and Manchester respectively the District Registrars of the High Court, and in a Court other than the High Court, the Registrar shall keep books according to the Forms in the Appendix, and the particulars given under the different heads in such books shall be entered forthwith after each proceeding has been concluded.

(2) The Officers of the Courts whose duty it is to keep the books prescribed by these Rules shall make and transmit to the Board of Trade such extracts from their books, and shall furnish the Board of Trade with such information and returns as the Board of Trade may from time to time require.

GAZETTING IN A WINDING-UP BY THE COURT.

209. *Gazetting Notices. Form* 103.—(1) All notices subsequent to the making by the Court of a winding-up order in pursuance of the Act or the Rules requiring publication in the *London Gazette* shall be gazetted by the Board of Trade.

(2) Where any winding-up order is amended, and also in any case in which any matter which has been gazetted has been amended or altered, or in which a matter has been wrongly or inaccurately gazetted, the Board of Trade shall re-gazette such order or matter with the necessary amendments and alterations in the prescribed form, at the expense of the Company's assets, or otherwise as the Board of Trade may direct.

210. *Filing Memorandum of* Gazette *notices. Form* 104.—(1) Whenever the *London Gazette* contains any advertisement relating to any winding-up proceedings the Official Receiver or Liquidator as the case may be shall file with the proceedings a memorandum referring to and giving the date of the advertisement.

(2) In the case of an advertisement in a local paper, the Official Receiver or Liquidator as the case may be shall keep a copy of the paper, and a memorandum referring to and giving the date of the advertisement shall be placed on the file.

(3) For this purpose one copy of each local paper in which any advertisement relating to any winding-up proceeding in the Court is inserted, shall be left with the Official Receiver or Liquidator as the case may be by the person who inserts the advertisement.

(4) A memorandum under this Rule shall be *primâ facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* or newspaper mentioned in it.

ARRESTS AND COMMITMENTS.

211. *To whom warrants may be addressed.*—A Warrant of Arrest, or any other Warrant issued under the provisions of the Act and Rules, may be addressed to such Officer of the Court, or to such High Bailiff or Officer of any County Court, whether such County Court has jurisdiction to wind up a Company or not, as the Court may in each case direct.

212. *Prison to which person arrested on Warrant is to be taken.*—Where the Court issues a Warrant for the arrest of a person under any of the provisions of the Act or Rules, the prison (to be named in the Warrant of Arrest) to which the person shall be committed shall, unless the Court shall otherwise order, be the prison used by the Court in cases of Orders of Commitment made in the exercise by the Court of its ordinary jurisdiction.

213. *Execution of Warrants of Arrest outside ordinary jurisdiction of Court. Forms* 105 *and* 106.—Where a Warrant for the Arrest of a person has been issued by a Court other than the High Court under any of the provisions of the Act and Rules, the High Bailiff of the Court, or other Officer of the Court to whom the Warrant is addressed, may send the Warrant of Arrest to the Registrar of any other Court (other than the High Court) within the ordinary jurisdiction or district of which such person shall then be or be believed to be, with a Warrant annexed thereto under the hand of the High Bailiff or Officer and Seal of the Court from which the Warrant originally issued, requiring execution of the Warrant by the Court to which it is so sent; and the Registrar of the last-mentioned Court shall seal or stamp the Warrant with the Seal of his Court, and issue the same to the High Bailiff or other proper Officer of his Court, with an endorsement thereon in the Form 106; and thereupon such last-mentioned High Bailiff or Officer may, and shall in all respects execute the said Warrant according to the requirements thereof, and all Constables and Peace Officers shall aid and assist within their respective districts in the execution of such Warrant.

214. *Prison to which a person arrested is to be conveyed, and production and custody of persons arrested.*—(1) Where a person is arrested under a Warrant of Commitment issued under any of the provisions of the Act and Rules, other than sections 174 and 176 of the Act, and Rule 66 of the Rules, he shall be forthwith conveyed in custody of the Bailiff or Officer apprehending him to the prison of the Court within the ordinary jurisdiction of which he is apprehended, and kept therein for the time mentioned in the Warrant of Commitment, unless sooner discharged by the Order of

the Court which originally issued the Warrant of Commitment, or otherwise by law.

(2) Where a person is arrested under a Warrant, issued under section 174 or section 176 of the Act, or under Rule 66 of the Rules, he shall be forthwith conveyed in custody of the Bailiff or Officer apprehending him to the prison of the Court within the ordinary jurisdiction of which he is apprehended ; and the Governor or Keeper of such prison shall produce such person before the Court as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order, or such person shall be otherwise discharged by law. Provided that where any such person is conveyed to a prison other than the prison used by the Court which originally issued the Warrant in cases of Orders of Commitment made by such Court in the exercise of its ordinary jurisdiction, the Court may by Order direct such person to be transferred to such last mentioned prison ; and on receipt of such Order the Governor or Keeper of the prison to which such person has been conveyed, shall cause such person to be conveyed in proper custody to the prison mentioned in such Order, and the Governor or Keeper of such last mentioned prison shall, on production of such Order and of the Warrant of Arrest, receive such person, and shall produce him before the Court, as it may from time to time direct, and shall safely keep him until such time as the Court shall otherwise order, or such person shall be otherwise discharged by law.

MISCELLANEOUS MATTERS.

215. *Board of Trade orders.*—The Board of Trade may from time to time issue general orders or regulations for the purpose of regulating any matters under the Act or the Rules which are of an administrative and not of a judicial character. Judicial notice shall be taken of any general orders or regulations which are printed by the King's printers, and purport to be issued under the authority of the Board of Trade.

216. *Enlargement or abridgment of time.*—The Court may, in any case in which it shall see fit, extend or abridge the time appointed by the Rules or fixed by any order of the Court for doing any act or taking any proceeding.

217. *Formal defect not to invalidate proceedings.*—(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

(2) No defect or irregularity in the appointment or election

of a Receiver, Liquidator, or member of a Committee of Inspection shall vitiate any act done by him in good faith.

218. *Application of existing procedure.*—In all proceedings in or before the Court, or any Judge, Registrar or Officer thereof, or over which the Court has jurisdiction under the Act and Rules, where no other provision is made by the Act or Rules, the practice, procedure and regulations shall unless the Court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a Palatine Court and County Court in accordance, as far as practicable, with the existing Rules and practice of the Court in proceedings for the administration of assets by the Court.

219. *Petitions in Liverpool and Manchester District Registries.*—The provisions of Rule 2 of the Rules of the Supreme Court, 1887 (c), relating to petitions in the District Registries of Liverpool and Manchester, shall apply to petitions presented in those Registries under the Act and Rules.

220. *Annulment.*—The Companies (Winding-up) Rules, 1903, and the forms thereby prescribed are hereby revoked and annulled, provided that such revocation and annulment shall not prejudice or affect anything done or suffered before the date on which these rules come into operation under any Rule or Order which is hereby revoked and annulled and that no rule or practice which was annulled or repealed by the said Rules and Orders shall be revived by reason of the revocation and annulment hereby effected.

221. *Short title and commencement.*—These Rules may be cited as the Companies (Winding-up) Rules, 1909. They shall come into operation on the 1st day of April, 1909.

Loreburn, C.

I concur,

Winston S. Churchill,
President of the Board of Trade.

The 29th day of March, 1909.

(c) Rules of the Supreme Court, May, 1887, printed in Statutory Rules and Orders, Revised (1st Edition) Vol. 7, p. 333.

THE COMPANIES (WINDING-UP) RULES, 1920.

1. The following Rules shall be inserted in the Companies (Winding-up) Rules, 1909, as Rule 184B.

184B. The total of any items of costs (as distinct from payments) in respect of business done after the 31st day of December, 1919, in a winding-up in a County Court shall be increased by 33⅓ per centum, and such increase shall be allowed upon any taxation of costs whether as between Party and Party or as between Solicitor and Client.

Provided (*a*) that this rule shall not apply to items in respect of business the remuneration for which is regulated by the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, or by the Solicitors' Remuneration Act General Order, 1919;

(*b*) that this Rule shall not affect the power to direct payment of a sum in lieu of costs under Order 65, Rule 23, of the Rules of the Supreme Court, or the power to allow a fixed sum for costs under Order 65, Rule 27 (38) of the said Rules, or a gross sum under Order 65, Rule 27 (38a) of the said Rules, and

(*c*) that this Rule shall not apply to Bills of Costs which have at the date on which this Rule comes into operation already been delivered to the Official Receiver or Liquidator for taxation or delivered to a client sought to be charged therewith, or to the person chargeable therewith or liable therefor, or to Bills then already taxed and certified or allowed.

Rule 184A is hereby revoked except in respect of business done before the 1st day of January, 1920, and except as regards those Bills of Costs which are excluded from the operation of this Rule by the last preceding proviso to this Rule.

The increase thereby authorised shall not affect the question whether a Bill of Costs when taxed is or is not less by one-sixth part than the bill delivered, sent or left.

2. These Rules may be cited as the Companies (Winding-up) Rules, 1920.

Dated the 9th day of June, 1920.

Birkenhead, C.

I concur.

R. S. Horne,
President of the Board of Trade.

THE COMPANIES (WINDING-UP) RULES, 1921.

1. Rule 50 (1) of the Companies (Winding-up) Rules, 1909, is hereby revoked and annulled, and the following Rule shall stand in lieu thereof:—

"50 (1). A person who under section 147 of the Act has been required by the Official Receiver to submit and verify a statement of affairs of the Company shall be furnished by the Official Receiver with such forms (if any) as the Official Receiver shall in his discretion consider necessary. The statement shall be made out in duplicate, one copy of which shall be verified by affidavit. The Official Receiver shall cause to be filed with the Registrar the verified statement of affairs."

2. The following Rule shall be inserted in the Companies (Winding-up) Rules, 1909, after Rule 149, and shall stand as Rule 149A:—

"149A. (1) Except where and so far as the nature of the subject matter or the context may otherwise require, the preceding Rules 123 to 132 both inclusive, 134, and 138 to 149 both inclusive, so far as they relate to Liquidator's meetings of creditors, shall apply to meetings of creditors held in pursuance of section 188 of the Act, but so nevertheless that the said Rules shall take effect as to such last mentioned meetings subject and without prejudice to any express provisions of the Act.

(2) The Chairman of the meeting shall have power to adjudicate upon the right of a creditor to vote and the amount for which he should be allowed to vote, but the decision of the Chairman of the meeting shall be subject to appeal to the Court.

(3) For the purpose of voting, a secured creditor shall, unless he surrenders his security, lodge with the Liquidator before the meeting a statement giving the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote in respect of the balance (if any) due to him after deducting the value of his security. The vote of a secured creditor who has not complied with this Rule shall not be counted at the meeting.

(4) No solicitation shall be used by or on behalf of any person whom the Court is asked to appoint Liquidator under the provisions of section 188, in obtaining votes or proxies or in procuring his appointment, and on every application to the Court to appoint a Liquidator under that section, the applicant shall, unless the Court otherwise directs, produce an affidavit by the proposed Liquidator proving that no such solicitation has been used by or on behalf of such proposed Liquidator."

3. These Rules may be cited as the Companies (Winding-up) Rules, 1921, and shall come into operation on the 1st day of September, 1921.

Dated the 26th day of July, 1921.

I concur,

Birkenhead, C.

Stanley Baldwin,
President of the Board of Trade.

TEST QUESTIONS

which should be considered by the Student after reading each Chapter.

CHAPTER III.

1. What restrictions are imposed on the choice of a name by a limited company?
2. Can a limited company in any case dispense with the use of the word "limited" as part of its name?
3. How is the domicile of a company (1) fixed and (2) changed?
4. If there is no registered office, how can writs be served?
5. Distinguish between acts which are *ultra vires* the directors and *ultra vires* the company.
6. How can the powers of a company be changed?
7. Give an example of—
   (1) an illegal object.
   (2) a main object.
8. What is the effect of a company giving up its main object?
9. Are the powers in the Memorandum strictly construed?
10. In what different ways may the liability of members be limited?
11. Give in outline the contents of a Memorandum of Association.
12. How many persons are necessary to form (1) a public company, (2) a private company?
13. Who are the "signatories of the Memorandum"? What are their duties?

CHAPTER IV.

1. What is meant by the "regulations" of a company?
2. State some of the matters usually contained in Articles of Association.
3. What is "Table A"?
4. How and with what restrictions can the Articles be altered?

5. To what extent are the Articles binding on—
   (1) the company?
   (2) the members?
6. Who is the Registrar of Companies? What matters are entered in his register? Contrast his register with the register kept by the company.
7. State the rule in the *Royal British Bank* v. *Turquand*.

CHAPTER V.

1. What is the position of a person who enters into a preliminary contract on behalf of a company not yet formed?
2. What steps must be taken for the purpose of registering—
   (1) a new company?
   (2) an existing unregistered company?
3. How far is the certificate of incorporation conclusive evidence?

CHAPTER VI.

1. What remedies has a person who has been induced to take shares by false statements in a prospectus?
2. What is a prospectus?
3. Enumerate the matters which must be disclosed in a prospectus. Does it make any difference if—
   (1) it is not issued to the public?
   (2) it is issued more than a year after the company can commence business?
4. What is the "minimum subscription"?
5. If a company does not issue a prospectus, what provisions apply?

CHAPTER VII.

1. In what three ways can persons become members of a company?
2. Is it necessary in all cases that a person should be entered on the register before he becomes a member?
3. In what case may a signatory of the Memorandum be excused from taking and paying for the shares for which he has signed?
4. Is the entry on the register conclusive evidence that a person is a member?

5. Can (1) a married woman, (2) a company, (3) an infant, be members of a company?
6. Can a company buy its own shares?
7. How can a person cease to be a member of a company?
8. Describe the liability of a member—
   (1) while he is a member;
   (2) after he has ceased to be a member.
9. Under what circumstances can shares be allotted for a consideration other than cash? To what extent is the amount of the consideration material?
10. If the company allots shares in payment of an existing debt, is this an allotment for cash?
11. Who may inspect the register of members? May a member make extracts from the register?
12. Is a person liable as a contributory who has been induced to become a member by fraud?
13. Explain the position of a trustee who is entered on the register as a holder of shares. Is he personally liable for calls?

CHAPTER VIII.

1. What is an allotment of shares?
2. In a contract to take shares, what constitutes the offer, and what constitutes the acceptance?
3. Can there be a conditional allotment?
4. What provisions must be complied with before any allotment is made?
5. Explain the form, object, and effect of a share certificate.
6. Show what is meant by—
   (1) estoppel as to title;
   (2) estoppel as to payment.
7. How, and subject to what restrictions may a member transfer his shares?
8. May directors refuse to register a transferee without assigning any cause?
9. What rules govern the priority between several transferees of the same shares?
10. What is the effect of—
   (1) a blank transfer?
   (2) a forged transfer?

11. If a shareholder neglects to notice a letter from the company stating that a transfer of his shares has been presented is he thereby estopped from disputing the validity of the transfer?
12. What is the effect of an invalid transfer?
13. On the death of a member in whom do his shares vest? Are his executors liable for calls? Is his estate liable? Can the company insist on putting the executors on the register of members?
14. What is a share warrant to bearer? When may it be issued?
15. What is a call? Who can make calls?
16. What is the effect of money being paid up in advance of calls?
17. Show by examples that the power of making calls is in the nature of a trust.
18. When may directors declare shares to be forfeited?
19. May the company sell the forfeited shares?
20. When will equity relieve against such forfeiture?
21. What is the effect of a clause that any member who takes proceedings against the company shall forfeit his shares?
22. When shares have been forfeited, can the company sue the member for past calls?
23. When has a company a lien on shares?
24. Can lien be enforced—
    (1) by sale?
    (2) by forfeiture?
25. What rules determine the priority between the company's lien and a mortgage of shares made by a member?
26. Explain the difference in effect of the use of the words "due" and "indebted" in this respect.

CHAPTER IX.

1. Explain the difference between preference and ordinary shares.
2. What is meant by cumulative preference shares with preference as to capital? If shares are described simply as preference shares what cumulative or preferential rights do they carry?
3. What are founders' shares? What provisions in the Companies Act relate to founders' shares?
4. How can a company create reserve capital? What is the

nature of such capital? Can it be dealt with by the company?

5. How may capital be (1) altered, (2) reduced, (3) increased?
6. What is the effect of turning shares into stock? What kind of shares may be turned into stock?
7. When (if at all) may capital be reduced without the leave of the court?
8. What is meant by an all-round reduction? When is it allowed?
9. When and how can capital be cancelled without reducing capital?

CHAPTER X.

1. What are dividends? How are they declared and paid, and in what proportion among the members?
2. Out of what fund may dividends be paid?
3. Explain the difference between circulating capital and fixed capital. To what extent is this distinction of importance?
4. If directors wrongfully pay dividends out of capital, what is the extent of their liability?
5. If a director has been compelled to repay such dividends can he recover any proportion from shareholders?
6. Is a company bound to make good losses on trading in previous years before using all the profits of the current year in payment of dividend?

CHAPTER XI.

1. Is it necessary that the Memorandum should give a company express powers of borrowing?
2. How can the borrowing powers be restricted?
3. What circumstances are sufficient to give a company power to charge its uncalled capital?
4. What words are necessary to create such a charge?
5. Explain the effect of a company borrowing beyond its powers. Under what circumstances can the lender (1) recover his money, (2) get a valid charge?
6. What are Lloyd's Bonds?
7. Mention six ways in which a company can borrow money.

CHAPTER XII.

1. What are debentures?
2. What is debenture stock?

3. Enumerate the conditions generally indorsed upon a debenture.
4. What is the effect of declaring that an issue of debenture shall rank *pari passu*?
5. Define a floating charge, and explain its effect.
6. Does a floating charge take priority over (1) a subsequent legal mortgage taken (a) with (b) without notice of the debenture? (2) A subsequent equitable mortgage without notice?
7. When does a floating charge crystallise?
8. How is it that debentures are not generally assignable subject to equities?
9. What are the respective advantages of appointing a receiver—
   (1) under a power in the debenture?
   (2) by the court?
10. When will a manager be appointed?
11. What is the form of a trust deed to secure debentures?
12. What are the advantages of such a deed?
13. How does a bearer debenture differ in form from a debenture to registered holder?
14. Are bearer debentures negotiable?
15. Specify the provisions of the Companies Act, as to the registration of debentures, and the rights of members to inspect the registers.
16. What is the effect of non-registration?
17. Under what circumstances and with what limitations may the time for registration be extended?
18. How may debentures be transferred?
19. Can shares be issued at a discount?
20. Can debentures be issued at a discount?
21. What is the effect of an undertaking by the company to issue debentures?
22. Does a floating charge have priority over—
   (1) distress by landlord for rent?
   (2) payments which have preference in bankruptcy?
   (3) a garnishee order?
   (4) judgment creditors?
23. Enumerate the remedies of debenture-holders.
24. Why is it that an order for foreclosure is not often made in a debenture-holder's action?

CHAPTER XIII.

1. What is underwriting?
2. What is brokerage?
3. Under what circumstances is underwriting allowed?
4. Is it necessary to disclose sub-underwriting contracts in a prospectus?

CHAPTER XIV.

1. Show that directors are to some extent trustees and to some extent agents of the company. In what respect are they not properly described as trustees?
2. How are first directors appointed?
3. What is the effect of the number of directors falling below the minimum fixed by the Articles?
4. Define a quorum of directors.
5. What provisions are made by the Companies Act, as to the qualification of directors?
6. Can a director sue the company for remuneration—
   (1) if none is agreed upon?
   (2) if he has served for part of a year?
   (3) if there are no profits?
7. What powers are usually given to the directors?
8. If a disqualified director acts as director, what is the result? Can the Articles provide against this?
9. Under what circumstances can a director make contracts with the company?
10. Are directors liable for (1) slight negligence, (2) gross negligence? What relief is given to directors in this respect by the Companies Act?
11. Is a director bound to attend board meetings?
12. If one director is compelled to pay for misfeasance, can he recover contribution from the other directors?
13. If a director dies, can his executors be made liable for—
   (*a*) misstatements in a prospectus?
   (*b*) misfeasance?

CHAPTER XV.

1. Distinguish between the three different kinds of meetings of members.
2. What provision is made by the Companies Act for requisitioning a meeting?

3. Can a chairman arbitrarily close a meeting?
4. To what extent is the chairman's entry in the minute book conclusive evidence?
5. How are the votes taken at a meeting?
6. Can proxies be counted on a show of hands?
7. Distinguish between—
   (1) an ordinary resolution;
   (2) a special resolution; and
   (3) an extraordinary resolution.

CHAPTER XVI.

1. Are directors bound to keep accounts?
2. Is a company bound to have its accounts audited?
3. What are the duties of auditors?
4. Can they be made liable for negligence?

CHAPTER XVII.

1. Define a private company.
2. How does a private company differ from a public company?
3. What is a syndicate?

CHAPTER XVIII.

In what respect does a company limited by guarantee differ from a company limited by shares?

CHAPTER XIX.

1. When may a company be wound up by the court?
2. Is fraud a sufficient ground for winding up by the court?
3. How may the insolvency of a company be proved?
4. Who may petition for winding up?
5. Contrast the rights of a contributory to demand winding up by the court with those of the creditor.
6. Can a fully-paid shareholder petition?
7. How long must a person have been a member of a company to entitle him to petition?
8. What orders may be made by the court on a winding-up petition?

CHAPTER XX.

1. When and by what means may a company be wound up voluntarily?
2. What is the effect of a voluntary winding up?
3. Sketch the proceedings in a voluntary winding up.
4. Show the extent of the liquidator's liability for the debts of the company.
5. How is a liquidator appointed in a voluntary winding up?
6. How does a company come to an end on a voluntary winding up?
7. Contrast the rights of contributories and creditors to petition for winding up by the court after a voluntary winding up has commenced.

CHAPTER XXI.

1. What is the effect of an order for winding up under supervision?
2. Why is the order of less effect now than formerly?

CHAPTER XXII.

1. Enumerate the powers of a liquidator appointed by the court.
2. Does the property of the company vest in the liquidator?
3. Define the position of a liquidator and discuss his duties.

CHAPTER XXIII.

1. What is the effect of a winding up on—
   (1) proceedings against the company?
   (2) dispositions by the company of its property?
2. How must a creditor prove his claims against the company?
3. What debts may be proved?
4. What is the effect of not proving within the time specified?
5. How are the costs of proving a debt provided for?
6. What rules of bankruptcy practice apply to the winding up of companies?
7. Show how the rights of the contributories are adjusted by the liquidator.

8. How does winding up affect the position of the servants of the company?
9. What persons may be summoned and examined by the court on a winding up?

CHAPTER XXIV.

1. Describe the usual method of reconstruction of a company.
2. Can a contributory be deprived of his right to claim a sale of his shares under section 192?
3. Can the undertaking of a company be sold to a foreign company for the purpose of reconstruction?

The following further Test Questions are based on Papers set for the Examinations held by the Institute of Chartered Accountants.

INTERMEDIATE EXAMINATION.

1. Whose agent is (*a*) a receiver appointed by debenture-holders, (*b*) a receiver appointed by the court? Is either of them ever personally liable on the contracts which he makes?
2. Under what circumstances and how is a receiver authorised to borrow?
3. Compare the powers of a liquidator—
   (*a*) on a voluntary winding up.
   (*b*) on a winding up under supervision.
   (*c*) on a winding up by the court.
4. What are the provisions of the Companies (Consolidation) Act as to accounts in a compulsory liquidation being submitted for audit?
5. What is the effect of the court making an order for compulsory winding up after a voluntary winding up has commenced? From what time does the winding up in such a case date?

FINAL EXAMINATION.

LIQUIDATORS (TRUSTEES) AND RECEIVERS.

1. "A liquidator is under a statutory liability on which he may at any time be sued by creditors or contributories."

Discuss this statement and add such qualification as you think necessary.

2. Under what circumstances and up to what date can a creditor prove for interest on his debt in a winding up?
3. How does (*a*) the non-registration of debentures, (*b*), the registration of debentures after a winding up has commenced, affect the rights and duties of a liquidator in distributing the proceeds of the assets realised in a winding up?
4. Does a floating charge have priority over—
   (*a*) a person who has supplied goods to the company under a hire-purchase;
   (*b*) distress by landlord for rent;
   (*c*) judgment creditors;
   (*d*) payments which have preference in bankruptcy?
5. Why and under what circumstances is a receiver and manager appointed?
6. How may a receiver be appointed? Does the method of his appointment affect his personal liability?

[BANKRUPTCY AND] COMPANY LAW.

1. The Z. A. Co., Ltd., went into voluntary liquidation for the purposes of reconstruction in 1913, and by a special resolution (passed on March 4th and confirmed on March 24th) approved the sale of its undertaking to the R.E. Co., Ltd., for shares in that company. X., a shareholder, did not vote at either meeting, and strongly objected to accepting shares in the R.E. Co., Ltd.
   What were his remedies (*a*) in March, 1913?
   (*b*) in March, 1914?
2. State shortly the various ways in which the capital of a company is most frequently altered, and distinguish between Reduction and Diminution of Capital.
3. Can (*a*) shares, (*b*) debentures be issued at a discount? Do you see any reason for differential treatment in this respect?
4. "An auditor is not bound to be a legal expert or a detective." Discuss this statement with reference to Limited Companies.
5. The articles of a Limited Company gave the directors power to accept surrender of shares. Under what circumstances

does this power enable the directors to accept a surrender of—

(*a*) shares which are partly paid up;

(*b*) shares which are fully paid up.

6. The Memorandum of a Limited Company contained no power—

(*a*) to pay dividends;

(*b*) to borrow;

(*c*) to charge its property.

Can the company exercise any of these powers without having its memorandum extended?

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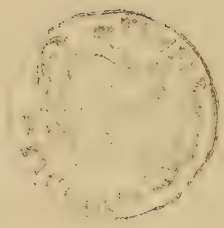
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